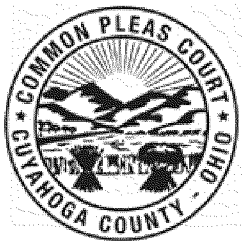

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Court of Common Pleas

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STEVEN SCHMITZ ET AL

vrs.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL

CV 14 834486

Judge:

DEENA R. CALABRESE

Pages Filed: 169

IN THE COURT OF COMMON PLEAS CUYAHOGA COUNTY, OHIO

STEVEN SCHMITZ and YVETTE SCHMITZ,	:	
Plaintiffs,	:	Case No. CV 14 834436
v.	:	Hon. Deena R. Calabrese Magistrate Judge Monica Klein
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, AND UNIVERSITY OF NOTRE DAME,	:	**Opposition of Plaintiff to Motion of Defendant University of Notre Dame to Dismiss the Complaint and for a more Definite Statement of Facts**
Defendants.	:	

OPPOSITION OF PLAINTIFFS TO MOTIONS OF DEFENDANTS NOTRE DAME AND NCAA TO DISMISS THE COMPLAINT

Dated: January 22, 2015

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TABLE OF AUTHORITIES

The Plaintiffs, Steven and Yvette Schmitz, by and through undersigned counsel, respectfully submit this Opposition to the Motions of the University of Notre Dame ("Notre Dame") and National Collegiate Athletic Association ("NCAA") to Dismiss the Complaint. Hereinafter, those Motions are referenced respectively as "Notre Dame Memorandum" and "NCAA Memorandum."

I. SUMMARY OF ARGUMENT

The Defendants have failed to establish that the Complaint pleads no set of facts upon which Steve and Yvette Schmitz can recover. Instead, they attempt to distort the pleading into a purported claim for an injury that allegedly occurred in 1978 and that Steve Schmitz allegedly knew and appreciated at that time. The Complaint never makes such an allegation. To the contrary, the Complaint alleges a latent injury or disease (the signature disease of chronic head impacts in football, Chronic Traumatic Encephalopathy or CTE) that according to the medical literature manifests years or decades after the harmful exposure. The Complaint actually alleges that Steve Schmitz was exposed to the risk of CTE when he played football at Notre Dame, but did not learn of the latent injury and its cause until much later in life.

Nowhere in the Complaint does Steve Schmitz ever claim that a competent medical authority ever diagnosed him with a latent disease or condition more than two years prior to the filing of the Complaint. Nowhere in the Complaint does Steve Schmitz allege that he was aware that he sustained a latent brain injury at Notre Dame or that the concussive and sub-concussive events he experienced constituted an injury. Obviously, however, Steve Schmitz was exposed to the risk of latent injury as a college football player. That injury and symptoms became manifest decades after his exposure. The Neurology Department of the Cleveland Clinic first diagnosed

him with CTE thirty-four (34) years after he played football at Notre Dame[1] and eighteen (18) months before he first filed his lawsuit[2] against the Defendants.

As a result, the Court should apply the straight-forward rule of Ohio law: unless the Complaint pleads averments that prove beyond doubt that plaintiff cannot recover on his claim, a motion to dismiss must be denied. This is particularly true when, as here, the Defendants' Motions are based upon the statute of limitations. Defendants' Motions cannot be granted, except if the Complaint conclusively shows on its face that the action is barred.

In this case, the Complaint sets forth facts that allege that Steve Schmitz was exposed to the risk of a latent brain injury, the symptoms of which became manifest later in life. The Plaintiffs also allege that Steve Schmitz obtained the diagnosis and was made aware of the cause of the injury only later in life. The Plaintiffs have put the Defendants on notice that this is their claim. They need do no more under Ohio law. For that reason, the Motions to Dismiss should be denied. Pursuant to the Ohio discovery rule, the statute of limitations begins to run in a latent disease case either (1) when a competent medical authority tells the plaintiff that he has been injured by the subject exposure or (2) by due diligence, the plaintiff should have discovered that he was injured by the exposure. *See O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St. 3d 84, 447 N.E.2d 727. In either circumstance, the limitation period does not commence until the plaintiff knows of the specific injury and its cause. Otherwise, the limitation period would run before the plaintiff knew he has a cause of action, which would be an inequitable result and not the law of Ohio. Under *both* prongs of the Ohio discovery rule, Plaintiff Steve Schmitz could

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[1] In an excess of caution, the Plaintiffs are setting forth these facts in connection with a Motion for Leave to File an Amended the Complaint, also filed today.

[2] Plaintiffs first filed their lawsuit against the Defendants on June 26, 2014 in the Federal District Court for the Northern District of Ohio, Case No. 14-cv-01399. Plaintiffs dismissed the Complaint voluntarily without prejudice and re-filed the case in this Court.

not have discovered his latent condition until the symptoms became manifest and a diagnosis made. Thus, this lawsuit – which was filed 18 months after the diagnosis – is not barred by the two-year statute of limitations and must survive the Defendants' Motions to Dismiss.

The cases upon which the Defendants rely are not latent injury cases. Every case cited involves a plaintiff who recognized the injury at the time it occurred, could identify the defendant, and knew cause. Those facts are the opposite of what is alleged here. This case is analogous to the numerous cases in Ohio that apply the discovery rule to latent disease/injury cases where the actual injury arising from exposure is unknown and not manifest until much later in the plaintiff's life, whereupon a competent medical authority diagnosed the injury and cause.

Defendant Notre Dame and NCAA argue that the Complaint's Fraudulent Concealment claim is not a cause of action but merely an equitable doctrine to toll a statute of limitations. Defendants are mistaken, and the Complaint properly pleads the claim under the law of Indiana and Ohio.

Defendant NCAA argues that the Plaintiffs' tort claims should be dismissed because NCAA had no duty to Steve Schmitz. NCAA's argument is without merit. Its duty is clear and specific, as stated in its Constitution, bylaws and handbooks. In addition, Defendant NCAA assumed that duty by its direct participation in and control of the safety of college football players.

Both Defendants argue that the breach of express contract claim should be dismissed, because Steve Schmitz fails to attach the express contract to the Complaint. That is easily remedied in the First Amended Complaint.

Defendant Notre Dame argues that the statute of limitations bars the breach of contract claims, and the Ohio discovery rule does not apply to extend the limitation period. The

discovery rule, however, is an equitable rule and may be applied in a case where a latent disease and injury cannot be discovered until it is manifest and diagnosable. The one case Notre Dame cites does not bar application of the discovery rule to a contract claim; rather, it leaves open the possibility that under the right facts and circumstances, the discovery rule may be appropriate for a contract claim.

Defendant NCAA also claims that there is no properly pleaded claim for breach of implied contract. The NCAA is mistaken. The Complaint adequately pleads the claim.

II. RELEVANT FACTS

1. The Complaint pleads:

a. that Steve Schmitz, like other Notre Dame players, sustained sub-concussive and concussive head impacts that exposed him to the risk of developing brain disease later in life and that Steve Schmitz did, in fact, develop the disease CTE and its accompanying conditions later in life (Complaint at ¶¶ 3, 61, 121-126);

b. that Steve Schmitz' symptoms and injuries are now manifest and have been diagnosed as CTE by a competent medical authority (Complaint at ¶ 19);

c. that the persons in charge of the NCAA and those in charge of the Notre Dame football program never informed Steve Schmitz that the sub-concussive and concussive events to which he (and others) were exposed had potentially latent and debilitating consequences later in life, particularly if left unmitigated and untreated (Complaint at ¶¶ 2, 10, 62-64, and 117);

d. that the Defendants never warned that concussive and sub-concussive head impacts exposed players to short-term or long-term consequences that included latent brain disease and disability later in life (Complaint at ¶ 117);

e. that Steve Schmitz never understood or appreciated the nature or risk of latent brain disease that could be caused by concussive or sub-concussive events he (and others) sustained as players in the Notre Dame football program (Complaint at ¶ 18);

f. that the sub-concussive and concussive impacts Steve Schmitz sustained led to symptoms and disease "manifest later in life" (Complaint at ¶ 125);

g. that his current disability is based on "the latent effects" of the sub-concussive and concussive impacts he sustained (Complaint at ¶¶ 125-126);

h. that both the NCAA and Notre Dame had superior knowledge about this risk of latent disease and that Steve Schmitz had no knowledge (Complaint at ¶¶ 18, 121);

i. that while he was a player at Notre Dame, no one employed by Notre Dame or the NCAA ever examined or tested Steve Schmitz for concussion symptoms, advised him about what a concussion is, or advised him about what concussion symptoms are and what risks they present (Complaint at ¶ 64);

j. that Notre Dame and the NCAA knew or should have known a vast reservoir of information about the risks of concussive and sub-concussive head impacts and their long-term latent effects, but failed to inform or protect Steve Schmitz and other Notre Dame football players regarding the single worst injury they could sustain in football short of paralysis (Complaint at ¶¶ 33-39, 65-97); and

k. that Notre Dame and the NCAA affirmatively undertook duties (by common law and contract) to protect the health and well-being of Steve Schmitz, but failed to perform those duties (Complaint at ¶¶ 41-55, 112-116).

2. The Complaint never asserts that Steve Schmitz ever knew or recognized he had any injury from sub-concussive and concussive impacts while he was a player at Notre Dame. It

never claims that Steve Schmitz was ever hospitalized, removed from a game, or treated for a concussive or sub-concussive impact while he played football at Notre Dame.

3. The Complaint never states that Steve Schmitz ever knew, was aware of, or received information from anyone that his experience in football put him at risk for latent brain disease at any time before a competent medical authority informed him of the diagnosis and cause.

4. The Complaint does not plead that Steve Schmitz knew (or was told) he had sustained an injury of any kind either when he played football at Notre Dame or at any time before he was diagnosed with CTE.

5. Notre Dame complains that the Complaint does not state when the diagnosis occurred. The Complaint, however, is adequate on its face to show that the claims are timely, and a motion to dismiss on the statute of limitations must be denied. The specific date of the diagnosis of CTE is in his medical records and can be obtained in discovery.

III. ARGUMENT

A. Standard of Review

"A motion to dismiss for failure to state a claim upon which relief can be granted … tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 1992 Ohio 73, 605 N.E.2d 378 (1992). A motion made pursuant to Civ.R. 12(B)(6) only determines whether the pleader's allegations set forth an actionable claim. *Pyle v. Ledex, Inc.*, 49 Ohio App.3d 139, 143, 551 N.E.2d 205 (12th Dist.1988). "A court may not use the motion to summarily review the merits of the cause of action." *Home Builders Assn. of Dayton & Miami Valley v. Lebanon,* 12th Dist. No. CA2003-12-115, 2004 Ohio 4526, ¶ 8.

"In order for a complaint to be dismissed under Civ.R. 12(B)(6) it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief." *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002 Ohio 2480, ¶ 5 (emphasis added). "In construing a complaint upon a motion to dismiss for failure to state a claim, [the Court] must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party." *Mitchell v. Lawson Milk Co., 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988)*. The Court may look only to the complaint to determine whether the allegations are legally sufficient to state a claim. *Home Builders Assn.*, 2004 Ohio 4526 at ¶ 8.[3] "[A]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy Patrol,* 60 Ohio St.3d 143, 145, 573 N.E.2d 1063 (1991).

B. The Defendants Have Failed to Establish Beyond Doubt that Plaintiffs' Claims Are Time-Barred.

It is axiomatic to the law of Ohio that unless the Complaint pleads averments that prove beyond doubt that under no set of facts could the plaintiff ever recover for his claim, a motion to dismiss must be denied. *Vandemark v. Southland Corp.*, 38 Ohio St. 3d, 1, 16-17, 525 N.E. 2d 1374, 1379 (1988) (motion to dismiss denied where complaint did not show beyond doubt that the plaintiff's cause of action was time-barred); *Tarry v. Fechko Excavating, Inc.*, No. 98C007180, 1999 WL 1037755, AT *2 (Ohio App. Nov. 3, 1999)[4] (judgment for defendant on motion to dismiss reversed and remanded, because the face of the complaint set forth facts upon which the plaintiff could recover, and applicable statute of limitations was tolled until plaintiff discovered the wrongdoer). For that reason, the Supreme Court of Ohio has stated that "[a]

[3] Attached as Exhibit A to the Appendix.

[4] Attached as Exhibit B to the Appendix.

motion to dismiss a complaint under Civ. R. 12(B) which is based upon the statute of limitations is erroneously granted where the complaint does not conclusively show on its face the action is barred by the statute of limitations." *Velotta v. Leo Petronzio Landscaping, Inc.*, 69 Ohio St. 2d 376, 379, 433 N.E.2d 147, 150 (1982).

It is equally axiomatic that it is not necessary for a plaintiff to specify facts to defend against a motion to dismiss on a statute of limitations ground. *Warren v. Estate of Durham*, No. 25624, 2011 WL 6211794, at *2 (Ohio App., Dec. 14, 2011)[5] (dismissal reversed, because the complaint did not prove beyond doubt that plaintiff's claim was barred by the statute of limitations.) *See also Irvin v. Am. Gen. Finance, Inc.*, No. CT2004-0046, 2005 WL 1607460, at *5 (Ohio App. June 30, 2005).[6] In *Irvin*, the appeals court reversed the trial court's entry of judgment for Defendants on a motion to dismiss and found that a violation of the statute of limitations was not obvious on the face of the complaint. *Id.* The appeals court noted that "[b]ecause Ohio is a notice pleading state, it suffices that the complaint put Defendants on notice of the general claim. It was not necessary to specify facts to defend from a statute of limitations defense." *Id.*

Where, as here, the Complaint pleads a latent undiscoverable injury that became manifest many years later, and a cause of the injury discovered only after (a) the injury became manifest and (b) a competent medical authority diagnosed the condition, the complaint does not on its face show beyond doubt that the plaintiff cannot recover. *See e.g.*, *Tarry*, 1999 Ohio App. LEXIS 5130, at *5-6. In *Tarry*, the plaintiff alleged trespass by flooding of his property based on improper underground construction on adjacent property. The improper construction and flooding began in 1991. Because the flooding was underground, plaintiff did not discover the

[5] Attached as Exhibit C to the Appendix.

[6] Attached as Exhibit D to the Appendix.

cause and wrongdoer until 1997. The trial court dismissed the complaint on the grounds that plaintiff had not pleaded facts purporting to extend the statute of limitation. *Id.* at *3. The court of appeals reversed and stated that the defendant, not the plaintiff, must affirmatively plead the statute of limitations. This must be done in a responsive pleading, not on a motion to dismiss. *Id.* at *3-4. The appeals court stated:

> the affirmative defense of the statute of limitations is not one of the defenses which Civ. R. 12(B) specifically permits to be raised by motion before a responsive pleading. Because of this, dismissal pursuant to Civ. R. 12(B) is not appropriate on the basis of [defendant's] assertion that [plaintiff's] complaint is time-barred.
>
> Even if we view the dismissal in the manner the trial court did, the action was inappropriately dismissed. A motion to dismiss a complaint pursuant to Civ.R. 12(B)(6) may properly be granted when it appears "beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. University Community Tenants* Union (1975), 42 Ohio St. 2d 242, 327 N.E.2d 753, *syllabus*. "As long as there is a set of facts, consistent with the plaintiff's complaint, which would allow plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Highway Patrol (1991),* 60 Ohio St. 3d 143, 145, 573 N.E.2d 1063. The Supreme Court of Ohio has indicated that, "[a] motion to dismiss a complaint under *Civ. R. 12(B)* which is based upon the statute of limitations is erroneously granted where the complaint does not conclusively show on its face the action is barred by the statute of limitations." *Velotta v. Leo Petronzio Landscaping, Inc.*, 69 Ohio St. 2d 376, 379, 433 N.E.2d 147 (1982). To conclusively show that the statute of limitations bars the action, the complaint must demonstrate both the relevant statute of limitations and the absence of factors which would toll the statute or make [the statute] applicable.

Tarry, 1999 Ohio App. LEXIS 5130, at *3-4.

The Complaint in this case clearly and unequivocally alleges an injury Steve and Yvette Schmitz did not discover until later in Steve Schmitz' life. They discovered the injury and its cause only after the brain disease developed, the injury became manifest, and a competent medical authority diagnosed the cause. *See* pages 3-5 *supra*. Under those circumstances,

discovery will show that Steve and Yvette Schmitz became aware of the injury, the diagnosed medical cause, and the wrongdoer very recently and that they filed their Complaint well within the two year limitation period for personal injury claims. The Complaint does not specify precisely when they discovered the injury or when a competent medical professional diagnosed the cause of the injury, because Ohio law does not require the Plaintiff to specify those facts. The facts will arise via discovery, and the Defendants are on notice of the Plaintiffs' claims. As long as the Complaint puts the Defendants on notice of the general claim, the pleading is sufficient. *Irvin*, 2005 Ohio App. LEXIS 3271, at *20.

C. The Discovery Rule Applies to this Case.

Contrary to the Defendants' arguments, the discovery rule applies to this case. The discovery rule is an exception under Ohio law and "...only applies in situations where the wrongful act does not immediately result in injury or damage." *See Metz v. Unizan Bank*, 649 F.3d 496, 497 (6th Cir. 2011). The purpose of the rule is to "limit the unconscionable result to innocent victims" who could not have discovered the wrong, even when exercising care and diligence. *See Al-Mosawi v. Plummer*, No. 24985, 2012 WL 6674490, at *4 (Ohio Ct. App. Dec. 21, 2012)[7] (citation and internal quotation marks omitted); *see also O'Stricker*, 4 Ohio St.3d at 87 ("In certain circumstances, this court has determined that applying the general rule 'would lead to the unconscionable result that the injured party's right to recovery can be barred by the statute of limitations before he is even aware of its existence.'"). Ohio courts have employed the discovery rule in several areas of the law, including medical malpractice, fraud, wrongful death, toxic exposure, and negligence cases. *See Flagstar Bank, F.S.B. v. Airline Union's Mortg. Co.*, 128 Ohio St.3d 529, 532, 947 N.E.2d 672, 675-76 (2011) (and cases cited therein).

[7] Attached as Exhibit E to the Appendix.

The claim of Steve and Yvette Schmitz meets the discovery rule exception in Ohio. The statute of limitations begins to run in latent disease cases either (1) when a competent medical authority tells the plaintiff that he has been injured by the subject exposure or (2) by due diligence, the plaintiff should have discovered that he was injured by the exposure. *See O'Stricker*, 4 Ohio St. 3d at 84. Steve and Yvette Schmitz have pleaded that the Plaintiff suffers from latent brain disease and that its cause was only diagnosed by a competent medical authority later in life when it became manifest. Complaint at ¶¶ 19, 125, 132, 142.

Thus, Ohio's discovery rule should apply to this case. Although Steve Schmitz experienced sub-concussive and concussive impacts at Notre Dame that put him at risk to developing a latent disease later in life, the cause of action did not accrue until he received a diagnosis of the latent disease (CTE) by a competent medical authority.

Prior Ohio cases illustrate that the statute of limitations must commence only when a plaintiff is diagnosed by a competent medical authority. In *Colby v. Terminix, et al.*, No. 96-CA 0241, 1997 WL 117218, at *3 (Ohio App., Feb. 10, 1997),[8] the plaintiff developed a symptom, laryngitis, after defendant Terminix sprayed her workplace with chemicals. The plaintiff saw a physician (Dr. Given), who speculated that the sprayed chemicals caused the laryngitis, but the doctor could not establish the connection except over time and with additional tests. *Id.* at *2. The plaintiff and physician pursued a specialist (Dr. Nelson) for a medical opinion. Some years after the exposure and laryngitis, the specialist provided a diagnosis that the plaintiff had developed a chemical sensitivity to the chemicals sprayed by Terminix, which had caused her symptoms. *Id.*

[8] Attached as Exhibit F to the Appendix.

When faced with the question of when the statutes of limitations began to run, the appeals court reversed a grant of summary judgment in favor of the defendant and followed Ohio's discovery rule set forth in Ohio's definitive asbestos exposure case, *O'Stricker*, 4 Ohio St. 3d at 84. In pertinent part, the appeals court held that a mere suspicion of a connection between a symptom and the cause of a symptom is insufficient to commence the running of the limitations period without a firm diagnosis by a competent medical authority. The court stated:

> The discovery rule provides the cause of action arises on the date on which the injured person is informed by **competent medical authority** that he has been injured, or upon the date on which the injured party should have become aware that he had been injured, whichever date occurred first. *See O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St. 3d 84, 447 N.E.2d 727.
>
> Appellant urges she could not reasonably have known the extent or the cause of her injuries prior to Dr. Nelson's March 8, 1993 diagnosis. Appellants' expert witness submitted an affidavit offering the professional opinion that injuries due to chemical exposure cannot be properly diagnosed without extensive testing, and must be analyzed by a trained physician. The expert opined a lay person could not make a causal connection between chemical exposure and the resulting injury. Appellant asserts although she was aware at least in 1992 that there could be some connection between the spraying and her cough and laryngitis, she was not aware that these symptoms could or would develop into a permanent and disabling condition. **In addition, although Dr. Given was suspicious of the chemicals being used in her workplace, no expert medical opinion, based upon a reasonable degree of medical certainty, was available until Dr. Nelson gave his final opinion on March 8, 1993.**

Colby v. Terminix, et al., 1997 Ohio App. LEXIS 1043 *6-7 (Emphasis added). The Court held that mere suspicion of the need to investigate is not the same as definite information (i.e. diagnosis from a competent medical authority). The Court specifically held:

> We believe, however, alerting a person's suspicions of the need to investigate does not rise to the same level as receiving definite information by competent medical authority. **Suspicion is not sufficient to trigger the discovery rule.**

> We find although the facts are undisputed, reasonable minds could reach different conclusions regarding the inferences permissible from those facts. For this reason, we conclude summary judgment was inappropriate.
>
> The assignment of error is sustained.

Id. at *8-9 (Emphasis added).

A similar analysis occurred in *Williams, et al. v. Boston Scientific Corp.*, No. 3:12CV1080, 2013 WL 1284185, at *3 (N.D. Ohio Mar. 27, 2013).[9] In that case, two medical devices were implanted in a plaintiff to treat urinary incontinence in 1998. *Id.* at *1. The defendant manufactured and marketed both devices. *Id.* In 2008, the plaintiff had occasional episodes of urinary incontinence and informed a doctor, who offered no treatment at that time. In June 2011, she began having vaginal bleeding and increased incontinence. *Id.* In December 2011, a doctor at the Cleveland Clinic verified that the plaintiff had "an exposed vaginal sling that required resection" and she underwent surgery to remove eroded tissue in February 2012. *Id.*

According to the defendant, the plaintiff should have known of her injury in 2008, when she experienced occasional urinary incontinence, and her initial 2008 doctor's visit should have triggered the two year statute of limitations. *Id.* at *2. The plaintiff claimed that the limitations period was not triggered until her physician told her in February 2012 that the defective device likely caused her symptoms (that is, when she received a diagnosis from a "competent medical authority" under the standard). *Id.* at *3.

The court held that under Ohio's discovery rule that fact that "one may have some awareness, or even suspect a connection between the injury and possible cause does not trigger

[9] Attached as Exhibit G to the Appendix.

the statute." *Id.* The court reasoned that "[n]othing in the allegations as pled suggests, or provides the basis for a fair assumption that, [the plaintiff] knew enough in 2008 to connect her occasional stress incontinence with the injuries that the device, according to her complaint, ultimately caused." *Id.*

In both cases cited above, the plaintiffs exercised reasonable diligence in seeking out treatment from multiple doctors to address their symptoms. Ohio courts found the plaintiffs should not be penalized by having their claims foreclosed only because they failed to receive an accurate diagnosis in a more timely fashion. The cases serve as clear examples of how Ohio courts have prevented an "unconscionable result" that otherwise might have barred an injured party's right to recovery when a latent injury and unknown cause is involved.

The same is true in this case. Construing all inferences from the Complaint in favor of Steve and Yvette Schmitz, it is well within reasonable probability that Steve Schmitz began experiencing symptoms of depression and memory loss in or around his mid-fifties, but did not receive a diagnosis of CTE then, despite the fact he diligently sought medical care. It is also within reasonable probability, based on the Complaint, that at first Steve Schmitz was told he had symptoms of age-related senescence and that only after extensive tests over time did a competent medical professional diagnose his condition (CTE) and its cause (playing football at Notre Dame). It is also within reasonable probability, based on the Complaint, that the competent diagnosis arose in the last month of 2012, which is well within the two year limitations period, under a straight-forward application of the discovery rule. The allegations of the Complaint support this set of facts, and Steve Schmitz is not required to plead more.

Because all of these facts are probable (and an appropriate subject of discovery), the Defendants cannot claim that there are no set of facts (with respect to the statute of limitations)

upon which Steve Schmitz can recover. To the contrary, the allegations support a set of facts that show that Steve and Yvette Schmitz brought the Complaint well within the two year limitation period under the discovery rule.

D. Defendants Misconstrue the Complaint.

Defendants misconstrue the Complaint by arguing that Steve Schmitz must have known that he was injured when he sustained repetitive sub-concussive and concussive head impacts while a player at Notre Dame. Notre Dame Memorandum at 7-8; NCAA Memorandum at 8-9. They argue that the fact that Plaintiffs recognize now (in retrospect) that the repetitive head impacts exposed Steve Schmitz to the risk of long-term brain damage allegedly proves that Steve Schmitz knew he was injured between 1974 and 1978. NCAA Memorandum at 8-9; Notre Dame Memorandum at 7-8. That is not what the Complaint says. Rather, the Complaint alleges that Steve Schmitz never understood or appreciated the nature or risk of the sub-concussive and concussive impacts he sustained; that those impacts "significantly increased his risk of developing neurodegenerative disorders and diseases," and resulted in "latent effects" and "neurocognitive and neurobehavioral changes over time;" that his injuries were "latent" and "manifest later in life;" and that his current disability is based on "the latent effects" of those sub-concussive and concussive impacts. Complaint at ¶¶ 18, 117, 121, 123-126. The Complaint also alleges that the persons in charge of the Notre Dame football program never informed Steve Schmitz of the fact of or the risk of the sub-concussive and concussive events to which he was exposed; i.e. that they could cause potentially latent and debilitating consequences later in life, particularly if left untreated. *Id.* at ¶¶ 2, 10, 62-64, and117. It further alleges that the Notre Dame football program never warned of the sub-concussive and concussive head impacts in

football that exposed players to short-term or long-term consequences that included brain disease and disability later in life. *Id.* at ¶ 18, 117, 125-126.

At no point does the Complaint ever assert that Steve Schmitz knew or recognized that the sub-concussive and concussive impacts he sustained were an injury of any kind. The Complaint does not allege that Steve Schmitz was ever hospitalized, removed from a game, or treated for a sub-concussive or concussive impact while he played football at Notre Dame. The Complaint never states that Steve Schmitz ever knew, was aware, or received information from anyone that his experience in football put him at risk for latent brain disease and injury at any time before a competent medical authority informed him of the diagnosis and cause. The Complaint does not plead that Steve Schmitz knew (or was told) he had sustained an injury of any kind either when he played football at Notre Dame or at any time before he was diagnosed with CTE.

Defendants, therefore, have misconstrued the Complaint and drawn an unreasonable inference that is not possible. They infer and argue that Steve Schmitz purportedly knew by 1978 that football at Notre Dame caused him a specific and manifest injury he recognized and that he was aware that this allegedly manifest injury included, in whole or in part, the brain disease from which he now suffers, even though a competent medical authority diagnosed the disease in December 2012. The Defendants' inference is unreasonable and impossible. It is soundly contradicted by the Complaint.

The Defendants' purpose in drawing the unreasonable inference is to align the Complaint with cases in which the injury, wrongdoer, and cause of the injury was immediately apparent to the plaintiff. Those cases do not apply here for the reasons set forth above. They are distinguished below.

E. Defendants' Cited Cases[10] Do Not Apply.

The Defendants' mistaken and unjustified misconstruction of the Complaint leads them to cite cases that do not support their position that the limitation period for Plaintiffs' claims expired long ago. In each cited case, the plaintiff experienced and recognized an immediate injury, knew the cause, and could identify the potential defendant. That is not what happened here. The Complaint alleges an unknown, unrecognized, and latent injury to Steve Schmitz that became manifest and diagnosed by a competent medical professional much later in life. Only with that competent medical diagnosis could Steve Schmitz have become aware that he had an injury, knew the cause, and could identify potential defendants. See pages 4-6 above.

1. The Products Liability Cases Do Not Apply.

Notre Dame and NCAA, for example, cite the anomalous case of *Flynn v. Bd. of Trustees of Green Twp.*,[11] a products liability case involving a slip and fall caused by a latent defect. In *Flynn*, the plaintiff recognized the injury immediately. The plaintiff also appreciated the cause of the alleged harm. NCAA cites a similar case, *Swanson v. BSA,*[12] in which the plaintiff's injury resulted from a fall. *Swanson*, however, is distinguishable, because in *Swanson* the plaintiff was immediately injured and recognized the injury. Plaintiff Steve Schmitz never recognized an injury to himself and alleges that the Defendants did not either, despite their knowledge of the risks to Steve Schmitz. To the contrary, the Complaint alleges a latent debilitating brain disease diagnosed late in life.

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[10] Defendants' cited cases, if unpublished, are attached to the Appendices the Defendants provided. For brevity, Plaintiffs do not attach those cases to their Appendix.

[11] *Flynn v. Bd. of Trustees of Green Twp.*, 2006-Ohio-6622, ¶¶ 1, 7, cited by Notre Dame Memorandum at 14-15 and NCAA Memorandum at 16.

[12] *Swanson v. BSA*, 2008-0hio-1692, at 14 (4th App. Dist. April 2, 2008), NCAA Memorandum at 15.

Both Defendants cite *Baxley v. Harley-Davidson Motor Co.*,[13] a products liability case involving injury from a motorcycle crash in which the plaintiff suffered immediate harm to his leg, ankle and foot. The plaintiff received immediate medical attention and had his motorcycle evaluated within a week of the accident. There was no dispute that the motorcycle caused harm (i.e., "the causal link was obvious.") Here, Plaintiff Steve Schmitz is not alleging product liability. He is not alleging that he knew of any immediate harm to himself or that the Notre Dame football staff ever informed him that he'd been exposed to a latent and slow-developing disease that would one day disable him.[14]

NCAA cites to *Norris v. Yamaha Motor Corp,* 2009-Ohio-4158, ¶¶ 1, 6 (NCAA Memorandum at 19). That case included claims for statutory and common law product liability, negligence, breach of implied warranty and punitive conduct. Like every other case the Defendants cite, *Norris* benefitted from discovery and was decided on a motion for summary judgment. The alleged injuries arose when the plaintiff rolled his off-road vehicle, which landed on his leg and ankle. *Id.* at ¶ 3. Plaintiff recognized the injury when it happened. The event occurred on September 4, 2006. For complex reasons plaintiff filed a proper complaint four days past the expiration of the limitation period. *Id.* Summary judgment was granted, in part, because of this failure. The plaintiff also argued for application of the discovery rule, based on a letter he

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[13] *Baxley v. Harley-Davidson Motor Co.*, 2007-Ohio-3678, ¶¶ 3, 4, and 9, 172 Ohio App. 3d 517, 519-520, 875 N.E.2d 989, 990, cited in Notre Dame Memorandum at 15 and NCAA Memorandum at 17.

[14] NCAA cites *Thomas v. Galinsky,* 2004-Ohio-2789, ¶¶ 2, 16 (NCAA Memorandum at 15), another products liability case that also arose out of a motor vehicle accident, did not involve the discovery rule, and turned on the proper time period computations under Ohio Civil Rule 6. *Braxton v. Peerless Premier Appliance Co.* 2003-Ohio-2872, ¶¶ 1, 5 and 8. (Notre Dame Memorandum at 15 and NCAA Memorandum at 15, 17) was also a products liability that involved a latent defect and "an immediate injury from the explosion of his brand-new stove." In that case, the injury, cause and defendant were known immediately. Further, *Braxton* was decided on summary judgment and had the benefit of discovery.

received after September 11, 2006 that informed him of the vehicle's product defect. *Id.* at ¶ 5. Regardless, the injurious event was the date the vehicle rolled onto his legs, because the plaintiff knew the injury, the cause, and the potential defendant on the date the injury happened. The limitation period ran from that date. *Id.* at ¶¶ 5, 45.

Notre Dame cites to the Pennsylvania case, *Faheem v. GlaxoSmithKline, LLC.* Notre Dame Memorandum at 20-21. In that products liability action, the plaintiffs suffered heart attacks shortly after starting the allegedly defective medication, Avandia, but did not file their claims until seven years later. *Faheem v. GlaxoSmithKline, LLC*, No. 07-MD-01871, 2012 U.S. Dist. LEXIS 111272, *3-4 (E.D.Pa. Aug. 7, 2012). The defendant ("GSK") argued that there was sufficient information to put the plaintiffs on notice that they had a claim. In rendering judgment for GSK on the statute of limitations issue, the court considered the publicly available information and the plaintiffs' own knowledge of their injuries and diagnosis to which they admitted in discovery. The *Faheem* plaintiffs' knowledge was exceptional, far superior to anything Steve Schmitz could have known until he was diagnosed by a competent medical professional in December 2012. For example, GSK had sent a series of letters to healthcare professionals regarding certain studies. GSK also published a "Dear Avandia Patient" letter, which was a direct response to media interest and national television news programs. *Id.* at 12-14. Numerous related lawsuits were filed nationwide in 2007, but the plaintiffs failed to file their claims until 2011, four years later. *Id.* at 2, 4.

This Complaint is entirely different. Steve Schmitz never took a medication and never suffered an injury (e.g., a heart attack) close in time to the ingestion of a medication. He never received any communication at any time from the NCAA or Notre Dame regarding the risks to which he was subjected between 1974 and 1978. To the contrary, Steve Schmitz led a normal

life through to his 50's until symptoms arose that, after diligent investigation, a competent medical authority diagnosed as the CTE, the signature brain disease of football.

2. The Assault and Battery Cases Do Not Apply.

Both Defendants cite *Pingue v. Pingue*, 2004-Ohio-4173, ¶¶ 10, 14 and 17 (Notre Dame Memorandum at 16 and NCAA Memorandum at 17), which involved actions for assault and battery and intentional and unintentional infliction of emotional distress. The conduct at issue was physical abuse from a father to his son over approximately 28 years. Unlike this case, there was no reasonable dispute in *Pingue* that the injured son perceived the conduct to be injurious, wrong, and harmful at the time the father committed the harm. The *Pingue* Court distinguished the case from *Colby v. Terminex International Company, LP, supra* at 11-12, in which the plaintiff was suspicious but unaware of her true injury and cause until she received a competent medical diagnosis that explained what had happened to her. *Pingue*, 2004-Ohio-4173, ¶ 21. The distinction applies here, where Steve Schmitz did not know of any injury or its cause until he was diagnosed with CTE.

Notre Dame cites to the assault and battery case, *Grooms v. Grooms*, No. 84AP-773, 1985 WL 9879, at *1 and 2, (Ohio Ct. App. Feb. 26, 1985) (Notre Dame Memorandum at 17-18) for no apparent reason. The case did not involve a motion to dismiss but, rather, was aided by discovery. The plaintiff alleged a known injury (injuries to plaintiff's mouth and teeth), a known cause (assault and battery), and a known assailant (the defendant). Unlike in the Schmitz Complaint, the plaintiff recognized the acute (non latent) injury when it happened, knew the cause, and knew the wrongdoer.

Notre Dame also cites *Doe v. First United Methodist Church* 1994-Ohio-531, 68 Ohio St. 3d 531, 539, 629 N.E.2d 402, 409 (Notre Dame Memorandum at 17), another battery case that is

inapposite to this case. In *Doe*, the plaintiff at the age of majority knew that the battery had occurred and the identity of the alleged actor. There was nothing latent, unknown, or undiagnosed about the injury alleged.

Notre Dame cites a battery case outside of this jurisdiction. Like the other battery cases, *Clay v. Kuhl*, 189 Ill. 2d 603, 605, and 611; 727 N.E.2d 217, 219 and 222 (2000),[15] is distinguishable, because it involved an injury that plaintiff knew at the time it happened. The plaintiff alleged childhood sexual abuse. The Illinois court noted that under Illinois law the "[i]ntent to harm and a resulting injury are presumed from child sexual abuse." *Clay,* 189 Ill. 2d at 605 and 611; 727 N.E.2d at 219 and 222. The decision to dismiss was on a summary judgment motion after discovery. *Id.* at 605-06. The *Clay* Court noted that *Clay* was a case in which the events at issue gave rise to an immediate awareness of injury, which is distinct from cases in which the risk of harm is not immediately apparent. *Id.* at 612.

3. The Accident, Trespass, and Malpractice Cases Do Not Apply.

Both Defendants cite the construction case of *Jones v. Hughey*, (Notre Dame Memorandum at 17 and NCAA Memorandum at 17). In that case, the complaint alleged causes of action for fraud, negligent construction, and negligence in the completion of a property disclosure form. *Jones v. Hughey*, 2003-Ohio-3184, ¶¶ 2 and 8; 153 Ohio App. 3d 314, 315, 794 N.E.2d 79, 80. The case benefitted from discovery, and there was no dispute that the plaintiff

[15] Notre Dame Memorandum at 17.

knew of defects in his house the moment he moved in and knew the identity of those who allegedly caused the harm. *Jones*, 2003-Ohio-3184, ¶¶ 5-6, 9-10, and 27. [16]

Golla v. Gen. Motors Corp. 167 Ill. 2d 353, 355, 657 N.E.2d 894, 895-96 (1995) (Notre Dame Memorandum at 17) involved an automobile accident and is outside of this jurisdiction. Like other cases cited by the Defendants, the plaintiff in *Golla* knew the injurious event at the time the accident happened and sought medical attention immediately. The *Golla* court noted that a "sudden traumatic event," such as the automobile accident is sufficient to put the plaintiff on "notice that actionable conduct might be involved." *Id.* at 363-63. Further, *Golla* was a summary judgment case that benefitted from discovery. *Id.* at 355-356.

Rendered in Texas, *Howard v. Fiesta Texas Show Park, Inc.*, 980 S.W.2d 716 (Tex. App. 1998)[17], is a summary judgment case that also benefited from discovery. In *Howard*, the plaintiff sustained back injuries from a rollercoaster and sought medical treatment shortly after the event that gave rise to the injuries, one of which was "acute." *Id.* at 718. Unlike the *Schmitz* case, in *Howard*, the plaintiff knew of the injurious event at the time it happened, knew the potential defendant, and knew the diagnosis.

NCAA cites *Holmes v. Cmty. Coll. of Cuyahoga Cty.*, 97 Ohio App. 3d 678, 647 N.E.2d 498, 499 (1994), a case in which this Court decided a summary judgment motion aided by discovery in favor of the defendant. NCAA Memorandum at 12. In *Holmes*, as in the other cases the Defendants cite, the plaintiff knew the injury – an electric shock and resulting

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[16] The trespass case of *Mankes v. N. Ridgeville City Sch.*, No. 98CA007177, 2000 WL 563327, at *1 (Ohio Ct. App. May 10, 2000) is no different. Notre Dame Memorandum at 17. That case was also decided upon motion for summary judgment and benefited from discovery. In *Mankes*, the plaintiffs knew of the subject gasoline spill near their home and admitted during discovery that they knew of the harm more than two years before filing suit. *Id.*

[17] Notre Dame Memorandum at 11.

permanent injury – immediately upon its occurrence. *Id.* at 679. One question for discovery was when the plaintiff knew or should have known the cause of the injury. *Id.* at 678. The Court stated that "at the time of the accident, plaintiff was an owner of her own electrical company . . . and was also working as a journeyman electrician." *Id.* at 679. The facts showed the plaintiff's acute level of awareness. She had received emergency medical treatment for second degree burns and blurred vision and had applied for workers' compensation benefits for the burn and impaired vision. *Id.* at 682. In testimony, the plaintiff admitted to requesting an EKG to monitor her heartbeat during an emergency room examination since she was concerned about injury to her heart. *Id.* She acknowledged and reported the palpitations to her doctor more than two years before filing the complaint. *Id.* at 680-81.

By contrast, the Complaint in this case alleges a latent disease discovered late in life that arose from repetitive sub-concussive and concussive impacts sustained by an amateur football player between the ages of 18 and 21. The symptoms became manifest and diagnosable only when Steve Schmitz became a much older adult. Complaint at ¶¶ 123-125. It was impossible for an amateur college football player to be aware of the risk of exposure unless the people in charge of the program told him, which they did not. It was impossible for him to know of the injury, cause and potential defendants until a competent medical authority diagnosed him. *See Id.* at ¶¶ 10, 18-19, 117-118, 121, 125.

Notre Dame cites the medical malpractice case, *Salyer v. Riverside United Methodist Hosp.* case. Notre Dame Memorandum at 14, 16. *Salyer* was also decided upon motion for summary judgment and benefitted from discovery. It is completely distinct from the fact pattern set forth in the *Schmitz* Complaint. In *Salyer*, the plaintiff had surgery, underwent radiation therapy, possessed the subjective belief and awareness that he had radiation poisoning, and

contemporaneously discussed his concerns with his doctor, resulting in dosage changes. *Salyer v. Riverside United Methodist Hosp.*, 2002-Ohio-3068, ¶ 2. The plaintiff continued to "experience[] intense pain in the areas of his body that were irradiated, at least one open wound, and burned skin that became indurated and permanently discolored," which the plaintiff was told was not consistent with normal or common reactions. The plaintiff's doctor "informed plaintiff that plaintiff had received more radiation than had been intended." *Id.* at ¶ 3, 18. The plaintiff even previously consulted with an attorney, but chose not to pursue an action at that time. *Id.* at 20. Thus, *Salyer* is a case where the plaintiff knew of immediate harm, the cause, and the potential defendant, but inexplicably delayed filing suit. None of this awareness (or delay) can be found within the allegations of the Schmitz Complaint.

Notre Dame cites the California case of *Plumlee v. Pfizer, Inc.*[18] (Notre Dame Memorandum 14). In *Plumlee*, the court found that the plaintiff was sufficiently on notice of a claim under the consumer protection laws, in part, because she doubted the subject drug's efficacy and stopped taking it long before she watched a television news segment about the product. *Id.* at *3, 7. Unlike Plaintiff Steve Schmitz, the plaintiff in *Plumlee* had "actual knowledge" of the harm in the form of her knowledge of advertisements, drug labeling and the "ineffectiveness [of the drug] in treating her depression after three years." *Id.* at *8. If not for her personal knowledge of the drug's ineffectiveness and its labeling, the plaintiff may have prevailed on the statute of limitations issue. The *Plumlee* Court recognized that "the mere availability of public facts about Zoloft's ineffectiveness is insufficient to trigger a duty to investigate." *Id.* at *7 (*citing Nelson v. Indevus Pharms., Inc.*, 48 Cal.Rptr.3d 668, 670–73 (Cal. Ct. App. 2006). No such facts exist here. At a minimum, discovery should go forward, and the

[18] No. 13-CV-00414-LHK, 2014 WL 4275519, at *1, 4 (N.D. Cal. Aug. 29, 2014).

Defendants may test their statute of limitations defense the way the defendants did in virtually every case they cite.

The case of *In re Zyprexa Products Liab. Litig.* 549 F. Supp. 2d 496 (E.D.N.Y. 2008),[19] was rendered outside this jurisdiction and is easily distinguished. The case involved allegations of securities fraud and the doctrine of "notice to the market" as a method of imputing constructive knowledge of facts to various actors in the case. Such a doctrine is irrelevant to this case, because it cannot support a theory that Steve Schmitz had constructive knowledge of his latent brain disease or injury until they became manifest and were diagnosed. It cannot support a theory that Steve Schmitz at age 18-21 had constructive knowledge of the latent brain disease risks of which Notre Dame and NCAA were aware and from which Notre Dame and the NCAA were supposed to protect him.

4. Lapse of Time is Not a Barrier to Fair Prosecution.

Defendant Notre Dame argues that lapse of time is a significant barrier to fair prosecution of this matter. *See* Notre Dame Memorandum at 12. This concern is premature. No discovery has taken place. Much of the wrongful conduct and the events that give rise to the risk of latent disease took place within Note Dame and the NCAA and on the practice and game field. It is reasonable to predict that Notre Dame and NCAA still have documents, archives, practice and game films still in their possession. Steve Schmitz is now fifty-nine (59) years old. Many people who participated with him in Notre Dame's football program, as athletic directors, players, coaches, and trainers, are most likely still alive and available. As a result, there is no reason to think Defendants will suffer in this case from the loss of evidence. To the contrary, the

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[19] Notre Dame Memorandum at 14.

only loss of evidence involves the memory of Steve Schmitz and his ability to testify, and that will not prejudice Defendants.

5. Steve Schmitz Was Never in a Position to Understand the Risks to Which He was Exposed.

Notre Dame suggests that the *Schmitz* Plaintiffs knew (or should be charged with the knowledge of) the medical studies and opinions Plaintiffs cite in the Complaint. Notre Dame Memorandum at 15-16. The Complaint never alleges that Steve and Yvette Schmitz (laypersons) were aware of those studies and opinions, published in the scientific journals. To the contrary, the Complaint alleges that the Defendants had superior knowledge, including the NCAA's own concussion and injury surveillance data, and knew or should have known of those studies, knew or should have known the risk to the amateur football players they supervised and controlled, and knew or should have known that they were exposing those amateur players to life-altering latent brain disease. Complaint at ¶¶ 7-10, 18, 35-38, 65, 96, 100-103. The Complaint further alleges that the Defendants were in a superior position over Steve Schmitz that imbued in them with the power to prevent or mitigate the risks to Steve Schmitz and other players. *Id.* at ¶¶ 25, 52-54, 112-114, 121,132. The Defendants had the power to control safety risks on the football field and in practice and to address medical risks to all football players as they arose. They had made that commitment. *Id.* Steve Schmitz never had that power or knowledge. *Id.* at ¶ 18.

F. NCAA Had An Unequivocal Duty to Steve Schmitz.

The NCAA argues it has no duty, and assumed no duty, to protect the health and safety of college football players like Steven Schmitz. On that basis, the NCAA seeks to have the negligence claim (Count I) dismissed. NCAA Memorandum at 18-19. This argument fails, and

the Motion to Dismiss must be denied, because the *Schmitz* Complaint adequately alleges the requisite elements of this duty under either Indiana or Ohio law. [20]

The NCAA made the identical argument in a recent NCAA football player latent brain injury case in Pennsylvania. This specific argument, made on a motion to dismiss, was soundly rejected by the Pennsylvania court that found that the plaintiff adequately pled a negligence claim and a NCAA duty. The Pennsylvania court found that "plaintiffs have specifically identified at least four possible theories for the existence of a duty." *Onyshko v. NCAA*, No. 2014-3620, Common Pleas of Washington County, Pennsylvania, Order at 3 (December 4, 2014).[21] The four bases of the NCAA's duty are:

> (1) failure in its undertaking to provide adequate educational and safety standards for student athletes relating to long term head impacts , (2) failure in its undertaking to assist member institutions in protecting student athletes , (3) assumption of duty to student athletes by undertaking to act as a leader in providing "healthy and safe" environments, and (4) assumption of duty owed to student athletes of member institutions to formulate safety guidelines.

Id., Order at 2. In this case, the NCAA's Motion to Dismiss the negligence claim is no different from the one the NCAA filed in *Onyshko* and, for the reasons set forth herein, it should be denied.

The *Schmitz* Complaint adequately alleges a duty of the NCAA to Steve Schmitz under each of the three factors noted in the test set forth by the Indiana Supreme Court in *Webb v. Jarvis*: (1) the relationship between the parties; (2) the reasonable foreseeability of the harm to

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[20] NCAA argues that Indiana law applies. In conducting a choice of law analysis, however, Ohio has the most significant relationship to Plaintiffs' claims and the facts of this case. *See, e.g., Ohayon v. Safeco Ins. Co.*, 91 Ohio St. 3d 474, 477-78 (2001). Nevertheless, for the purposes of responding to Defendants' instant Motion, it does not matter whether this Court applies Indiana or Ohio law because, for the reasons set forth herein, the laws of both states are the same regarding duty.

[21] Attached as Exhibit H to the Appendix.

the person injured; and (3) public policy concerns. *Webb v. Jarvis, 575 N.E. 2d 992,995 (Ind. 1991).* In addition, the *Schmitz* Complaint adequately states a claim under the assumed duty test set forth in *Yost v. Wabash:* "The assumption of such a duty requires affirmative deliberate conduct … performed negligently." *Yost v. Wabash,* 3 N.E. 3d 509, 520-21 (Ind. 2014).

The *Schmitz* Complaint alleges a substantial relationship between the NCAA and Steven Schmitz, which supports the existence of the duty. The *Onyshko* court recognized this relationship: "Although the NCAA does not 'recruit' athletes it does actively seek – and benefit from – their participation in a variety of ways including advertising, merchandise sales, and television contracts." *Onyshko* Order at 3. This finding is equally true when applied to the relationship between the NCAA and Steve Schmitz, who was a Notre Dame football player. The *Schmitz* Complaint specifically alleges that the NCAA, since its inception in 1909, has identified its own purpose as the protection of student athletes. Complaint at ¶¶ 41-54. An NCAA official stated in 1909 that: "The lives of students must not be sacrificed to sports. Athletic sports must be selected with strict regard to safety." Complaint at ¶ 43. The NCAA has served as the main supervisor of safety and health across all of college football over the decades. In its own words, the NCAA states on its website that it was founded "to protect young people from the dangerous and exploitive athletic practices of the time." Complaint at ¶ 45. The NCAA further states that its "core mission is to provide student athletes with a competitive environment that is safe and ensures fair play." Complaint at ¶ 45. This duty is explicitly expressed in the NCAA Constitution which states the "Principle of Student Athletes Well Being," which contains a specific provision on health and safety. Complaint at ¶¶ 47-48. Furthermore, the NCAA has always specifically formulated and implemented regulations as to player safety in college football and publishes a Sports Medicine Handbook for the treatment and prevention of sports-

related injuries, including primarily college football, which is the most dangerous of all college sports in terms of latent head injury. Complaint at ¶¶49-51; *see also* ¶¶ 38, 81. The NCAA Handbook states: "student athletes rightfully assume that those who sponsor intercollegiate athletes have taken reasonable precautions to minimize the risk of injury from athletic participation." Complaint at ¶ 51.

These allegations are more than adequate to set forth the "relationship" requirement of *Webb v. Jarvis* in establishing the existence of NCAA's duty to the college football player. They also demonstrate a substantial if not absolute level of the NCAA's direct participation, control, and oversight of college football health and safety, and thus meet the standards of *Yost* for a sufficient relationship to support an assumed duty. *Yost*, 3 N.E. 3d at 517. In fact, the NCAA's own words, public proclamations, Constitution, and bylaws articulate its specific duty to protect the health and safety of college football players. Thus, the NCAA specifically admits to this duty.

The *Schmitz* Complaint also alleges sufficient facts to establish the foreseeability factor of the existence of a duty. Once again, in *Onyshko*, the NCAA challenged the sufficiency of the complaint on duty grounds under Pennsylvania law,[22] but the Pennsylvania court rejected the argument. Under Indiana law, foreseeability is also an element of establishing a duty. *Webb*, 575 N.E. 2d at 997 ("we focus on whether the person actually harmed was a foreseeable victim and whether the type of harm actually inflicted was reasonably foreseeable."). The *Schmitz* Complaint alleges that Steve Schmitz was a foreseeable plaintiff who suffered a foreseeable harm. The NCAA has known for decades that college football was particularly dangerous with respect to sub-concussive and concussive impacts. Complaint at ¶¶ 38, 39, 41, 63-79. In fact,

[22] Pennsylvania law also requires an allegation of foreseeability to establish a duty. *Dahlstrom v Shrum*, 368 Pa. 423, 84 A.2d 289, 290 (1951).

the NCAA was always in a superior position with respect to health and safety issues to the foreseeable plaintiffs; that is, college football players like Steve Schmitz in their late teens when recruited to play college football. Complaint at ¶¶ 4-9, 14-16, 40–53, 109. The NCAA was aware of the published medical and scientific literature describing latent head injuries in contact sports and football and its own data on this risk. Complaint at ¶ 72 ("[in 1952] an article published in the *New England Journal of Medicine* recommended a three-strike rule for concussions in football (*i.e.*, recommending that players cease to play permanently after receiving a third concussion. "); *see also* Complaint at ¶¶ 63-79.

The Complaint clearly alleges that college football players like Steve Schmitz were at risk, specifically to latent injuries from sub-concussive and concussive head impacts. Complaint at ¶¶ 9-10, 38, 43, 56-64. Furthermore, even after Steve Schmitz graduated from Notre Dame and moved into midlife, the NCAA gathered more and more specific information on the latent brain injury risks of college football, but never reached out and informed its former players so that they could become aware of the dangers and could take steps to mitigate the adverse health effects. *Id.* at ¶¶ 95-96, 102. Thus, the Complaint readily meets the foreseeability factor necessary to establish the NCAA duty. *Webb*, 575 N.E. 2d at 997.

Finally the *Schmitz* Complaint readily meets the public policy factor of establishing the existence of the NCAA duty of protecting the health and safety of college football players; in fact, the NCAA's own words, public proclamations, Constitution, and bylaws are a frank admission of the duty. *See* Complaint at ¶¶ 41-53. The public policy of preventing and mitigating devastating latent brain disease in college football players could not be more obvious as made clear by the damages allegations in the Complaint. Complaint at ¶ 125 ("The latent injuries sustained by Steve Schmitz [total disability at age 58 and a diagnosis of Chronic

Traumatic Encephalopathy "CTE"] developed over time and were manifest later in life."); *see also* Complaint at ¶¶ 11, 37-39, 122-125. States have a clear and demanding interest in preserving the health and safety of their college athletes, especially football players who are routine exposed to the risks of latent brain injury. Defendant NCAA does not even attempt to raise an argument as to public policy in its Motion to Dismiss. Thus, for purposes of its Motion, NCAA has admitted that this factor supports the existence of an NCAA duty to Steve Schmitz.

The *Schmitz* Complaint also readily meets the requirement of pleading adequate allegations to support its theory of an assumed duty or a voluntary undertaking. Once again the *Onyshoko* court specifically rejected the NCAA motion to dismiss and found the complaint adequately pled a breach of a duty arising from an undertaking by the NCAA to provide a "healthy and safe" environment for college football players. *Onyshko*, Order at 2. Under Indiana law, a plaintiff may state a claim for a duty arising from a voluntary undertaking in several ways. *City of Muncie Fire Dept v. Weidner*, 831 N.E. 2d at 212 (Ct of App., Indiana 2005) (an assumed duty exists based on an allegation that the defendant's "failure to exercise reasonable care increases the risk of such harm," or an allegation that "the harm is suffered because of reliance …upon the undertaking."); *Yost*, 3 N.E. 3d at 517 (An assumed duty exists based on allegation of "affirmative deliberate conduct," performed negligently.). This question, the assumption of a duty and the extent of it, are questions for the fact-finder, and thus not amenable to a motion to dismiss where the plaintiff has made adequate allegations. *City of Muncie*, 831 N.E. 2d at 213.

Here, there are multiple allegations that meet this requirement, such as those alleging that the NCAA's failure to exercise reasonable care increased Steve Schmitz's risk of the latent disease of CTE, *see* Complaint at ¶¶ 9-10, 94, 117, and those alleging that the harm Steve

Schmitz suffered was due to his reliance on the NCAA's negligent undertaking of a health and safety duty, Complaint at ¶ 120; *see also Id.* at 18, 99-102. The Complaint also alleges affirmative deliberate conduct by the NCAA in negligently carrying out its undertaking of health and safety protection for college football players. Complaint at ¶¶ 56-64, 123-124. Thus, Steven Schmitz's Complaint also adequately alleges an NCAA duty under the doctrine of an assumed duty or voluntary undertaking under Indiana law.[23]

In the face of Steven Schmitz's substantial allegations establishing a NCAA duty under multiple theories, and prior case law (*Onyshko v. NCAA*) that rejected NCAA's identical argument, the NCAA here argues "red herring" facts about an alleged lack of general duties to adults at college involved in fraternity hazing. NCAA Memorandum at 18. In fact, the Complaint does not allege that the NCAA's duty to college football players is age-related or related to fraternities. Rather, the Complaint makes clear that all college football players such as Steven Schmitz whether adults or not, have been put at severe risk of latent brain injury because of their specific relationship with the NCAA, the entity in charge of college football safety, and because of the NCAA's direct participation and control of college football safety. Complaint at ¶¶ 9, 53-54, 112, 121. The NCAA follows its red herring argument about "adults," "fraternities," and "general duties" with the conclusory assertion that the *Schmitz* Complaint "offers no set of facts to show that the NCAA took affirmative and deliberate steps to assume a duty." NCAA Memorandum at 19. This assertion is baseless. The *Schmitz* Complaint, as demonstrated by the specific allegations cited above, as well as the relevant case law, alleges that the NCAA did owe such a duty to Steve Schmitz.

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[23]The law of Ohio on duty and assumed duty is no different from the law of Indiana, and the *Schmitz* Complaint also adequately alleges a duty under Ohio law. *Madden v. Production Concrete*, 5 N.E. 36, 38 (Ct. of App. Ohio 2013); *Baughman v. State Farm Auto Ins. Co.*, 2005 WL 335406 , at ¶¶41-42 (Ohio Ct. of Ap. Dec. 30,2005), attached as Exhibit I to the Appendix.

G. The Fraudulent Concealment Claim is Valid Under the Law of Indiana or Ohio.

The Defendants argue that Count II of the Complaint, entitled Fraudulent Concealment, is not a cause of action under Indiana law[24] but, rather, is an equitable tolling doctrine that operates to toll the statute of limitations. NCAA Memorandum at 17-18; Notre Dame Memorandum at 16, n.7. Defendants are quibbling over semantics. Contrary to the NCAA's assertions, both Indiana and Ohio law recognize fraudulent concealment as a cause of action that is a version of a claim for actual fraud. Plaintiffs have properly pleaded the claim.[25]

Under both Indiana and Ohio law, the elements of a claim of fraudulent concealment (or fraud by concealment) are similar to fraud. Under Indiana law, for example, the elements of fraud are as follows:

> (1) the fraud feasor must have made at least one representation of past or existing fact; (2) which was false; (3) which the fraud feasor knew to be false or made with reckless disregard as to its truth or falsity; (4) upon which the plaintiff reasonably relied; (5) and which harmed the plaintiff.

Wright v. Pennamped, 657 N.E. 2d 1223, 1230-31 (Ind. App. 1995) (citation omitted) (recognizing under Indiana law a fraud claim against a lawyer who had a duty disclose to the

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[24] NCAA argues that Indiana law applies. In conducting a choice of law analysis, however, Ohio has the most significant relationship to Plaintiffs' claims and the facts of this case. *See*, *e.g.*, *Morgan v. Biro Mfg. Co.*, 15 Ohio St. 3d at 342-43. Nevertheless, for the purposes of responding to Defendants' instant Motion, it does not matter whether this Court applies Indiana or Ohio law because, for the reasons set forth herein, the laws of both states are the same regarding Plaintiffs' claim of Fraudulent Concealment.

[25] Plaintiffs have not pleaded fraudulent concealment as an equitable doctrine to toll the statute of limitations. Rather, the Complaint alleges, *inter alia*, that Defendants fraudulently and knowingly concealed from NCAA football players generally, and Notre Dame football players specifically, including Plaintiff Steve Schmitz, the risks of head injuries and concussions, including later in life consequences of the repetitive head impacts he sustained while a football player at Notre Dame, and that as a direct and proximate result of such concealment, Steve Schmitz has suffered and will continue to suffer substantial injuries. *See* Complaint at ¶¶ 131-33.

opposing lawyer and party a material change he made to a transactional document). Although silence generally will not support a claim for fraud, Indiana recognizes an actionable claim for fraudulent concealment, where there is a "duty to speak or to disclose facts." *See id.* at 1231 (citations omitted).

As to Indiana law, the failure of a party to disclose material facts, when the law imposes a duty to disclose, constitutes actionable fraud. *Loer v. Neal,* 127 Ind. App. 246, 254, 137 N. E. 2d 728 (1956) (citation omitted); *Allen Realty Co. v. Uhler,* 83 Ind. App. 103, 107, 146 N. E. 766 (1925) (citations omitted). That kind of fraud claim was addressed in *Wright v. Pennamped*, in which the Court of Appeals of Indiana reversed the trial court's entry of summary judgment in favor of defendants on the plaintiff's fraud claim against an opposing lawyer in a transaction who had concealed and failed to reveal material changes to a closing document the plaintiff had signed. *Wright*, 657 N.E. 2d at 1230-32. As a result of the opposing lawyer's concealment, the plaintiff sustained substantial financial losses. *Id.* at 1230-31. The Indiana appeals court noted that Indiana law recognizes such a claim when the defendant has a duty to speak or disclose material information and breaches that duty. *Id.* at 1231.

Under Indiana law, the duty to disclose exists in narrow relationships and is often assumed by the party who is in a dominant position under the circumstances. *See, e.g. Peoples Trust & Sav. Bank v. Humphrey*, 451 N.E.2d 1104, 1112 (Ind. App. 1983). The instances in which the duty exists, and in which a concealment is therefore actionable, include fiduciary relationships as well as,

> instances in which there is no existing special fiduciary relation between the parties, and the transaction is not in its essential nature fiduciary, but it appears that either one or each of the parties, in entering into the contract or other transaction expressly reposes a trust and confidence in the other; or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a

> trust and confidence in the particular case is necessarily implied. The nature of the transaction is not the test in this [category]. Each case must depend upon its own circumstances. The trust and confidence, and the consequent duty to disclose, may expressly appear by the very language of the parties, or they may be necessarily implied from their acts and other circumstances.

Id. at 1112 (quoting *McNair v. Public Sav. Ins. Co. of North America,* 88 Ind. App. 386, 163 N.E. 290, 293 (1928). The Indiana Court of Appeals in *Wright* recognized that "[o]missions are actionable as implied representations when the circumstances are such that a failure to communicate a fact induces a belief in the opposite." *Wright*, 657 N.E. 2d at 1230 (*quoting Midwest Commerce Banking v. Elkhart City Centre,* 4 F.3d 521, 524 (7th Cir. 1993)).

In Ohio, the law is essentially the same:

> A cognizable claim for 'fraudulent concealment' under Ohio law requires a plaintiff to show (1) a concealment of a fact when there is a duty to disclose; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance.

Allen v. Andersen Windows, Inc., 913 F. Supp. 2d at 513-14 (recognizing a claim for fraud against window company that allegedly concealed information about defects in windows where the defendant had a duty to speak or duty to disclose) (*citing Koyo Corp. of USA v. Comerica Bank,* No. 1:10-cv-2557, 2011 WL 4540957, (N.D. Ohio Sept. 29, 2011),[26] and *Cohen v. Lamko, Inc.,* 10 Ohio St. 3d 167, 169, 10 Ohio B. 500, 462 N.E.2d 407 (Ohio 1984)); *see also*, *Friedland v. Lipman*, 68 Ohio App. 2d 255, paragraph one of the syllabus (Ohio App. 8 Dist. 1980).

A defendant can be liable for a material omission if he has a duty to disclose the information. *Koyo Corp. of USA*, 2011 U.S. Dist. LEXIS 111880, at *19, 2011 WL 4540957

[26] Attached as Exhibit J to the Appendix.

(citing *Schulman v. Wolske & Blue Co., L.P.A.,* 125 Ohio App.3d 365, 708 N.E.2d 753, 758 (Ohio Ct.App.1998)). Therefore, a claim under Ohio law based on concealment must allege an underlying duty to disclose, which arises where there is relationship in which "one party imposes confidence in the other because of that person's position, and the other party knows of this confidence." *Spears v. Chrysler, LLC,* No. 3:08-cv-331, 2011 U.S. Dist. LEXIS 12014, at *27, 2011 WL 540284 (S.D. Ohio Feb. 8, 2011)[27] (quoting *Central States Stamping Co. v. Terminal Equip. Co., Inc.,* 727 F.2d 1405, 1409 (6th Cir. 1984).)

In this case, the Complaint alleges that the Defendant NCAA voluntarily assumed a duty to Steve Schmitz and every other football player at NCAA member institutions to protect their health and safety. *See* Complaint at ¶¶ 53-54. The NCAA was founded to protect the exploitation of student athletes. *Id.* at ¶¶ 41, 43-46. The NCAA even states this commitment to protecting the health and safety of its student athletes in its Constitution. *Id.* at ¶¶ 48-49. As a member institution of the NCAA charged with implementing health and safety measures to protect its football players, Defendant Notre Dame also assumed a duty to protect the health and safety of Steve Schmitz. *Id.* at ¶¶ 47, 49, 54. The Complaint alleges that both Defendants were in a superior position of knowledge to Steve Schmitz and knew the serious risk of short-term and long-term brain injury associated with repetitive traumatic impacts to the head to which Notre Dame football players are exposed. *Id.* at ¶¶ 129-31. The Complaint also alleges that Notre Dame had the power to impose (or not to impose) proper health and safety protocols, whereas Steve Schmitz had no such power. *See id.* at ¶¶ 18, 24. The NCAA and Notre Dame, according to the Complaint, concealed from Steve Schmitz the neurological health risks he was taking by failing to inform him. *Id.* at ¶131.

[27] Attached as Exhibit K to the Appendix.

Moreover, the Complaint also alleges that Steve Schmitz relied on Notre Dame for guidance on all health-related subjects, including risks of neurological damage from which he now suffers. *Id.* at ¶¶ 120, 132. Further, the Complaint alleges that "[b]ecause such information was not readily available to Steve Schmitz, the Defendants knew or should have known that Steve Schmitz would act and rely upon the guidance, expertise, and instruction of the Defendants on this crucial medical issue, while at Notre Dame and thereafter." *Id.* at ¶ 121. As such, the Complaint alleges that "[b]oth Defendants had a duty not to conceal material information from Notre Dame football players, including Steve Schmitz." *Id.* at ¶ 116.

Finally, the Complaint alleges that, notwithstanding its knowledge of the risks the football program purposefully imposed on Steve Schmitz and other football players, Notre Dame actually fostered and condoned a technique of blocking, running, and tackling that perpetrated sub-concussive and concussive head impacts on its players. *Id.* at ¶¶ 57-59.

Under the foregoing caselaw and the allegations of the Complaint, both Indiana and Ohio recognize fraudulent concealment as a cause of action, and Plaintiffs have properly pleaded that claim in the Complaint.

To the extent Defendants argue that Plaintiffs' fraudulent concealment claim is barred by Ohio's four-year statute of limitations, they are mistaken. Under § 2305.09 of Ohio Revised Code Annotated, the applicable statute of limitations does not begin to run until the fraud has been discovered. This statute of limitations does not begin to run until the fraud has actually been discovered or should have been discovered. *Doyle v. Ohio Co.*, No. 94-CA-16, 1994 WL 484205 (Ohio 2d App. Sept. 9, 1994)[28] (citing *Investors REIT One v. Jacobs*, 46 Ohio St. 3d 176, 181 (1989)). Because injury is an element of fraudulent concealment, *see supra*, and Plaintiffs'

[28] Attached as Exhibit L to the Appendix,

injury did not manifest until at least December 2012, *see* Section III.c., *supra*, Plaintiffs' claim for fraudulent concealment was filed well within the applicable four-year statute of limitations.

H. The Defendants' Argument Regarding the Express Contract is Without Merit.

1. Plaintiffs' Complaint is Sufficient Under Ohio and Indiana Law.

Defendants' argument that Plaintiffs fail to plead a sufficient claim for breach of express contract is without merit.[29] Plaintiffs' Complaint pleads sufficient factual allegations to survive a 12(b)(6) motion. Defendant NCAA also maintains that Indiana law governs Plaintiffs' breach of contract claims. NCAA Memorandum at 13. As shown below, Plaintiffs' Complaint properly and sufficiently pleads each element for cause of action for breach of contract under both Indiana and Ohio law.

To state a claim for a breach of contract action under Indiana law, a plaintiff must allege the existence of a contract, the defendant's breach, and damages. *McCalment v. Eli Lilly & Co.*, 860 N.E.2d 884, 894 (Ind. Ct. App. 2007). Similarly, the elements of a claim for breach of contract under Ohio law include: (1) that a contract existed; (2) that the plaintiff fulfilled his obligations; (3) that the defendant failed to fulfill his obligations; and (4) that damages resulted from this failure. *Lawrence v. Lorain Cty. Cmty. Coll.*, 127 Ohio App. 3d 546, 548, 713 N.E.2d 478, 480 (1998). The NCAA only disputes the first element—the existence of a contract between Plaintiff Schmitz and the NCAA. NCAA Memorandum at 15.

Under both Indiana and Ohio law, the essential elements of a contract include an offer, acceptance, manifestation of mutual consent, and consideration. *McIntire v. Franklin Twp.*

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[29] Defendant NCAA states that "the Complaint is completely devoid of factual allegations sufficient to show that an express written contract existed between the NCAA and Notre Dame." (NCAA Memorandum at 23). For the purposes of Plaintiffs' response, it is presumed that this is a typographical error.

Cmty. Sch. Corp., No. 49A02-1401-PL-2, 2014 WL 4065652 (Ind. Ct. App. Aug. 18, 2014)[30]; *Modern Office Methods, Inc. v. Ohio State Univ.*, 2012-Ohio-3587, ¶ 15, 975 N.E.2d 523, 527-28 (under Ohio law, the essential elements of a contract include "an offer, acceptance, contractual capacity, consideration…a manifestation of mutual assent and legality of object and of consideration").

Plaintiff Schmitz was a student-athlete at University of Notre Dame. Complaint at ¶ 136. Defendant Notre Dame is governed by the rules and regulations of the NCAA. *Id.* As alleged in the Complaint, the regulations required Plaintiff to enter into a contract with Defendant NCAA. *Id.* Plaintiff signed a form, and by doing so, acknowledged that he read Defendant NCAA's regulations and applicable NCAA Division manual. *Id.* By signing the form, he also acknowledged awareness that the NCAA Division manual encompassed the NCAA Constitution, Operating Bylaws and Administrative Bylaws. *Id.* Accordingly, by signing the form Plaintiff acknowledged his agreement to abide by the NCAA Division bylaws. *Id.*

Plaintiff does not aver that the "form" was itself the "contract." Rather, it was part of the contract, and more specifically, by Defendant NCAA providing the form to Plaintiff, and Plaintiff thereby signing the form, both parties manifested mutual assent. "Generally, courts presume that the intent of the parties to a contract resides in the language they chose to employ in the agreement," and NCAA provided the form and the terms therein. *L & M of Stark Cty., Ltd. v. Lodano's Footwear, Inc.,* 2006-Ohio-5997, ¶ 70 (citing *Shifrin v. Forest Enterprises, Inc.,* 64 Ohio St.3d 635, 638, 597 N.E.2d 499, 1992–Ohio–28).

Defendant NCAA argues that the Complaint contains no allegation that the NCAA "signed the form or otherwise agreed to be bound by any terms contained in the form," however,

[30] Attached as Exhibit M to the Appendix.

"the validity of a contract is not dependent upon the signature of the parties;" and again, the NCAA provided the form and the terms therein. *Indiana Bureau of Motor Vehicles v. Ash, Inc.*, 895 N.E.2d 359, 366 (Ind. Ct. App. 2008) (citing *Int'l Creative Mgmt., Inc. v. D & R Entm't Co.*, 670 N.E.2d 1305, 1312 (Ind.Ct.App.1996)). Indeed, acts which manifest acceptance are sufficient to show assent to the terms of a contract. *Id.*

The offer and acceptance were clearly described through the factual allegations. Plaintiff does not aver that the NCAA agreed to be bound by the terms in the form alone. Rather, the Complaint's averments that the NCAA Division manual encompassed the NCAA Constitution, Operating Bylaws and Administrative Bylaws, and that Plaintiff acknowledged the same by signing the form provided by NCAA, sufficiently pleaded that NCAA agreed to be bound by the terms of the contract, and signing of the form was Plaintiff's acknowledgement of the same.

Plaintiffs have also sufficiently pleaded the element of consideration, as shown by the allegations of the exchange of promises between the parties. Complaint at ¶ 137. The Complaint states that in exchange for Plaintiff's agreement to participate in football and abide by the foregoing rules and regulations, the NCAA promised to perform certain services and functions listed in the NCAA Constitution,[31] which included ensuring that the athletic programs would protect the "well-being of student-athletes,"[32] requiring Defendant Notre Dame to maintain a safe environment for the participating student-athletes,[33] and requiring member institutions to

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[31] The NCAA Constitution states that its purpose is to "uphold the principal of institutional control of, and responsibility for all intercollegiate sports in conformity with the constitution and bylaws…" NCAA Const., Art. 1, 1.2(b); see also Complaint at ¶ 46.

[32] NCAA Const., Art. 2, 2.2.

[33] NCAA Const., Art. 2, 2.23.

conduct the student-athlete activities "as an integral part of the student-athlete's educational experience."[34] Complaint at ¶ 137.

Defendant Notre Dame does not oppose the sufficiency of Plaintiffs' well-pleaded breach of express contract claim; rather, it avers that the claim is time-barred under Ohio Revised Code § 2305.10(A) and that the discovery rule does not apply. Notre Dame Memorandum at 18-19. The argument is misguided. Ohio courts have considered applying the discovery rule to breach of contract claims. *See Settles v. Overpeck Trucking Co.*, No. CA93-05-083, 1993 WL 534700, at *1 (Ohio Ct. App. Dec. 27, 1993) (analyzing the discovery rule under a breach of contract claim, but ultimately holding that the record did not support the tolling of the statute). For example, in the case cited by Defendant Notre Dame, the court did not hold that the discovery rule did not apply to contract claims. Rather, the court noted that no Ohio court had applied the rule to a contract claim and chose not to apply it to an oral contract under the facts of that case on the grounds that the case was "not a case 'where the injury complained of may not manifest itself immediately.'" *Pomeroy v. Schwartz*, 2013-Ohio-4920, ¶ 40 appeal not allowed, 2014-Ohio-1182, ¶ 40, 138 Ohio St. 3d 1450. Indeed, the appellants in *Pomeroy* knew or should have known by exercise of reasonable diligence of the alleged breach in 2003, did not make any demand until 2006, and waited another five years to file their lawsuit. *Id.*

The facts of *Pomeroy* are not all similar to the Complaint in this case. The Defendants unequivocally made an agreement with Steve Schmitz, express, implied, or both, that required them to protect his health and safety and implement appropriate procedures and protocols regarding sub-concussive and concussive impacts. Complaint at ¶¶ 9-10, 41-54. Defendants

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[34] NCAA Const., Art. 2, 2.2.

clearly breached the agreement. *See Id.* at ¶¶ 2, 55-64, 99-102, 140, 149-149, 157-159. Steve Schmitz' injury, by its nature, was latent and undiscoverable until a competent medical professional diagnosed him in 2012. Although the *Pomeroy* chose not to apply the discovery rule to the facts presented in *Pomeroy*, the court noted acknowledged that "fairness necessitates allowing the assertion of a claim when discovery of the injury occurs beyond the statute of limitations." *Id.* Under that principle, it is reasonable to believe that the *Pomeroy* court would have applied the discovery rule to Steve Schmitz' contract claims. Further, at a minimum, Plaintiff Schmitz should be allowed to proceed to discovery, as happened in *Pomeroy*, which was decided on summary judgment, not a motion to dismiss.

Although no Ohio court has applied the discovery rule to a breach of contract case, many other states—including Indiana—have held that "the statute of limitations in a breach of contract case can be tolled by the application of the discovery rule." *See Meisenhelder v. Zipp Exp., Inc.*, 788 N.E.2d 924, 929-30 (Ind. Ct. App. 2003); *Apr. Enterprises, Inc. v. KTTV*, 147 Cal. App. 3d 805, 830, 195 Cal. Rptr. 421, 435 (Ct. App. 1983) ("there are grounds to apply the discovery rule to breach of contract claims"); *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 589, 898 P.2d 964, 967 (1995) ("a significant number of courts in recent years have applied the discovery rule to contract cases"). The important inquiry when applying the discovery rule to breach of contract claims is whether a plaintiff's injury is difficult to detect—not whether the action sounds in contract or tort. *Gust, Rosenfeld & Henderson*, 182 Ariz. At 590, 898 P.2d at 968; *Meisenhelder*, 788 N.E.2d at 929 (noting that in an action for breach of written contract, the discovery rule tolls the statute of limitations to when a plaintiff "could have discovered that the contract had been breached"). For the same reasons, it is equitable in this

case to toll the statute of limitations period until Plaintiff Steve Schmitz discovered his symptoms, and a competent medical professional diagnosed injury and cause.

The NCAA also asserts that Ohio Rule of Civil Procedure 10(D)(1) requires that plaintiff attach a copy of the written instrument in question to the Complaint. NCAA Memorandum at 16. A plaintiff, however, can plead a prima facie case without attaching a written agreement to the complaint." *Fletcher v. Univ. Hosps. of Cleveland,* 120 Ohio St.3d 167, 897 N.E.2d 147, 2008–Ohio–5379, ¶ 11; *see also Keenan v. Adecco Emp. Servs., Inc.,* 2006-Ohio-3633, n.1.[35] Civil Rule 10(D)(1) permits the "…claim even if she does not have the written instrument in question, after which she is certainly entitled to obtain the instrument through discovery"). Even if the written instrument is not attached, a plaintiff can satisfy 10(D)(1) by providing an explanation for failing to attach the agreements in question. *Unifund CCR Partners v. Geisen Butler C.P.,* No. CV 2008-02-1066, 2008 WL 4612425, (May 7, 2008);[36] *Keenan*, 2006-Ohio-3633.

Here, Plaintiffs were unable to attach the form to the Complaint because Plaintiff is not in possession of the form, and upon information and belief, expects either or both Defendants to have a copy of the form or one substantially similar. Ohio case law supports Plaintiffs' contention that a valid reason for not attaching a copy of the written instrument would be that one does not have a copy of the instrument in his possession and is unable to obtain a copy. *Hodges v. Byars,* No. 12839, 1992 WL 113027, at *1 (Ohio Ct. App. May 28, 1992) (noting plaintiff "tried to rectify the error when he filed an amendment to the complaint and attached a

[35] Attached as Exhibit N to the Appendix.

[36] Attached as Exhibit O to the Appendix.

copy of the contract" and alleged that defendants "had the original contract in their possession and…refused to provide [plaintiff] with a copy").

The explanation provided in the proposed First Amended Complaint is sufficient factual support and supplements the allegations set forth in the Complaint. Taken together, the Amended Complaint and its supporting affidavit are sufficient to show that Plaintiffs have stated a claim for breach of contract under either state's law.

2. The Complaint's Breach of Implied Contract Claim is Sufficient under Ohio and Indiana law.

Defendant NCAA also seeks to dismiss Count IV, the breach of implied contract claim. As with the breach of express contract claim, Plaintiffs sufficiently pleaded a claim for breach of implied contract. Under Ohio law, an implied-in-fact contract exists when "the circumstances surrounding the parties' transaction make it reasonably certain that an agreement was intended." *Stepp v. Freeman*, 119 Ohio App. 3d 68, 74, 694 N.E.2d 510, 514 (1997). The parties' assent and agreement is inferred from the surrounding circumstances, including the conduct and declarations of the parties. *Id.; Campanella v. Commerce Exch. Bank*, 139 Ohio App. 3d 796, 806, 745 N.E.2d 1087, 1095 (2000). Similarly, Indiana law provides that a contract implied-in-fact "…arises out of acts and conduct of the parties, coupled with a meeting of the minds and a clear intent of the parties in the agreement." *J.W. v. Hendricks Cnty. Office of Family & Children*, 697 N.E.2d 480, 484 (Ind. Ct. App. 1998).

Defendant NCAA avers there are no facts alleged to show the parties intended for the NCAA Constitution and Bylaws to constitute an implied contract. NCAA Memorandum at 17. However, the NCAA Division manual expressly encompasses the NCAA Constitution, Operating Bylaws, and Administrative Bylaws. Complaint at ¶136. There is no requirement for the Complaint to allege that the parties intended these parts to constitute an implied contact,

because, as NCAA points out, an implied contract consists of obligations that arise from mutual agreement and intent to promise, when the agreement and promise have not been expressed in words. *J.W. v. Hendricks Cnty. Office of Family & Children*, 697 N.E.2d 480, 484 (Ind. Ct. App. 1998); *see also Legros v. Tarr*, 44 Ohio St. 3d 1, 7, 540 N.E.2d 257, 263 (1989) ("…the surrounding circumstances…made it inferable that the contract exists as a matter of tacit understanding"); *Lucas v. Costantini*, 13 Ohio App. 3d 367, 369, 469 N.E.2d 927, 929 (1983) (On the contrary, express contracts "connote[] a more formal exchange of promises where the parties have communicated in some manner the terms to which they agree to be bound."); *JKL Components Corp. v. Insul-Reps, Inc.*, 596 N.E.2d 945, 951 (Ind. Ct. App. 1992) ("A contract implied in fact derives from the 'presumed' intention of the parties as indicated by their conduct.")

Plaintiff Steve Schmitz played football and promised to perform in accordance with the rules and regulations of the NCAA, some of which were expressly outlined in the NCAA Division manual, which expressly encompassed the NCAA Constitution, Operating Bylaws and Administrative Bylaws. At the same time, the NCAA agreed to perform in accordance with the promises arising by the very nature of the relationship between the NCAA and student-athletes at NCAA member institutions (i.e., Notre Dame). The NCAA controls that student-athlete by express and implied agreement, and the NCAA also promises to protect the health and safety of that student-athlete. Complaint at ¶¶ 41-54.

The NCAA also argues that if there were an implied contract between the parties, the Complaint failed to allege facts to show that the NCAA breached the terms of the implied contract. NCAA Memorandum at 17. The Complaint, however, alleges two ways in which the NCAA breached the contract. It failed to provide an environment that reasonably protected the

health and safety of Steve Schmitz as an amateur football player and failed to educate Steve Schmitz on the latent brain injury risks to which he was exposed, both of which allege breaches of duties the NCAA was required to perform under the terms of its own Constitution, Operating Bylaws, and Administrative Bylaws. Complaint at ¶¶ 136, 148-49.

The Complaint sufficiently alleges conduct and a relationship of the parties that show a meeting of the minds. Plaintiff would abide by all NCAA rules and regulations while performing as a student-athlete, and NCAA would perform in accordance with the terms of the NCAA Constitution, Operating Bylaws, and Administrative Bylaws. Steve Schmitz, however, was the only party that performed. NCAA failed to provide the protections it promised. Accordingly, Plaintiffs sufficiently established Defendant NCAA's breach of the implied terms thereof.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs Steven and Yvette Schmitz respectfully request that the Court enter an Order denying the Defendants' Motions to Dismiss.

Dated: January 22, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically on January 22, 2015 using the CM/ECF filing system which I understand will send a notice of electronic filing to all parties of record through the Court's system, and served via regular mail on the following parties:

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Exhibit A

H

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Twelfth District, Warren County.
HOME BUILDERS ASSOCIATION OF DAYTON AND the MIAMI VALLEY, et al., Plaintiffs-Appellees,
and
Time Warner Cable, Intervenor/Plaintiff-Appellant
v.
The City of LEBANON, Ohio, et al., Defendants-Appellees.

No. CA2003-12-115.
Decided Aug. 30, 2004.

Background: Homebuilders' association and telecommunications company sued city for declaration that ordinance imposing mandatory fees to connect to city broadband line violated statute prohibiting political subdivisions that are cable providers from discriminating against private providers. The Court of Common Pleas, Warren County, dismissed action for failure to state a claim. Plaintiffs appealed.

Holding: The Court of Appeals, Walsh, J., held that telecommunications company stated claim against city for discriminating against private providers.

Reversed and remanded.

West Headnotes

[1] Telecommunications 372 1212

372 Telecommunications
372VI Cable Television
372k1212 k. Government or Public Ownership or Operation. Most Cited Cases
(Formerly 372k455(1))

Telecommunications company stated claim against city's alleged violation of statute governing city cable systems, where it alleged that city required residents to connect to city's broadband service, and to pay mandatory fee. R.C. § 1332.04(B)(1)(a, b).

[2] Appeal and Error 30 78(1)

30 Appeal and Error
30III Decisions Reviewable
30III(D) Finality of Determination
30k75 Final Judgments or Decrees
30k78 Nature and Scope of Decision
30k78(1) k. In General. Most Cited Cases

Trial court decision denying telecommunications company's motion for summary judgment, in company's action against city for unfairly discriminating against private cable providers, was interlocutory, and thus, not final for appeal. Const. Art. 4, § 3(B)(2).

Civil Appeal from Warren County Court of Common Pleas, Case No. 02CV59491.McNamee & Hill Co., LPA, Michael P. McNamee, Cynthis P. McNamee, Beavercreek, OH, for Home Builders Assn. of Dayton and the Miami Valley, Oberer Residential Construction, Ltd., Design Homes & Development Co., and Design Properties VIII, Ltd.

Aronoff, Rosen & Hunt, Richard A. Paolo, Cincinnati, OH, for Home Builders Assn. of Greater Cincinnati, the Drees Company, M/I Schottenstein Homes, Inc., and Crossmann Communities, Inc.

Dinsmore & Shohl LLP, James A. Comodeca, Linda A. Ash, James M. Wherely, Jr., Alan H. Abes , Cincinnati, OH; Law Offices of Nicholas E. Subashi, Lynnette Pisone Ballato, Dayton, OH; and Mark S. Yurick, City of Lebanon Attorney, Lebanon, OH, for defendant-appellee, City of Lebanon, et al.

Not Reported in N.E.2d, 2004 WL 1918930 (Ohio App. 12 Dist.), 2004 -Ohio- 4526
(Cite as: 2004 WL 1918930 (Ohio App. 12 Dist.))

Sharon A. Jennings, Assistant Ohio Attorney General, Columbus, OH, for intervenor Attorney General Jim Petro.

Ulmer & Berne, LLP, Donald J. Mooney, Jr., Cincinnati, OH, for intervenor/plaintiff-appellant, Time Warner Cable.

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WALSH, J.

***1** {¶ 1} Intervenor-plaintiff-appellant, Time Warner Cable ("TWC"), a division of Time Warner Entertainment Co., L.P., appeals the decision of the Warren County Court of Common Pleas granting the Civ.R. 12(B)(6) motion to dismiss filed by defendant-appellee, the city of Lebanon. We reverse the decision of the trial court and remand this matter for further proceedings.

{¶ 2} In March 2002, the city of Lebanon enacted legislation requiring new residential and commercial construction in the city to connect to the city owned and operated broadband telecommunications system. The broadband line is capable of providing cable television, internet, telephone, and meter reading services. Connection is mandatory, while use of the services offered over the broadband line is not. The city also enacted legislation which requires that mandatory fees of $1,250 per residential unit and $2,000 per commercial unit be paid to connect to the broadband line.

{¶ 3} TWC provides analog and digital cable television service within Lebanon pursuant to a 1996 franchise agreement. This agreement prohibits it from collecting any connection fee where certain population density requirements are met. TWC also provides high-speed internet access over its cable lines. TWC intervened as a plaintiff in a suit brought by the Home Builders Association of Miami Valley and others challenging the city's legislation requiring connection to the broadband line and payment of the related connection fee. TWC's complaint alleged that the ordinances violate R.C. 1332.04. This code section prohibits political subdivisions that are public cable providers from discriminating against private cable service providers in favor of their own service.

{¶ 4} The city moved to dismiss TWC's complaint pursuant to Civ.R. 12(B)(6) arguing that R.C. 1332.04 is unconstitutional as it impermissibly impinges on the city's "home rule" powers granted under the Ohio Constitution, Art. XVIII. The city argued that the legislation was a valid exercise of its constitutional powers of self-government, not subject to interference by legislation adopted by the Ohio General Assembly. Alternatively, the city argued that the legislation is an exercise of the city's constitutional police powers that may be limited only to the extent it conflicts with the state's general laws. TWC in turn moved for summary judgment.

{¶ 5} The trial court initially denied the motion to dismiss, but later granted the motion in part, upon the city's motion to reconsider. The trial court granted the motion to dismiss as it related to TWC's claims under R.C. 1332.04, concluding, in part, that R.C. 1332.04 is unconstitutional as applied to the city's legislation. The trial court made no finding as to whether the legislation violates R.C. 1332.04, but rather found that the state statute is not a "general law," and thus may not interfere with the city's exercise of its police power. TWC has appealed, raising two assignments of error.

***2** {¶ 6} Assignment of Error No. 1:

{¶ 7} "THE TRIAL COURT ERRED IN DISMISSING TWC'S CLAIMS ARISING UNDER O.R.C. SECTION 1332.04."

[1] {¶ 8} A motion to dismiss, filed pursuant to Civ.R. 12(B), is a procedural mechanism which tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio

St.3d 545, 548, 605 N.E.2d 378, 1992-Ohio-73. In construing a complaint upon a motion to dismiss for failure to state a claim, the material allegations of the complaint are taken as admitted and all reasonable inferences are drawn in favor of the nonmoving party. *Id.* Before the court may dismiss the complaint, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. *Id.* The court may look only to the complaint to determine whether the allegations are legally sufficient to state a claim. *Id.* A court may not use the motion to summarily review the merits of the cause of action. *State ex. rel. Martinelli v. Corrigan,* 68 Ohio St.3d 362, 363, 626 N.E.2d 954, 1994-Ohio-179. A reviewing court conducts a de novo review of a trial court's decision on a motion to dismiss as such a motion presents a question of law. *Schiavoni v. Steel City Corp.* (1999), 133 Ohio App.3d 314, 317, 727 N.E.2d 967 .

{¶ 9} In the present case, TWC sought a declaratory judgment and injunctive relief pursuant to R.C. 1332.09(B). This section provides as follows:

{¶ 10} "A person that is or is likely to be adversely affected by a violation of division (A), (B), or (C) of section 1332 .04 or division (C) of section 1332.05 of the Revised Code may bring a civil action for declaratory or injunctive relief in [ ] a court of common pleas. Such person that is or is likely to be adversely affected includes a person that provides, or has filed a pending application to provide, within the jurisdiction of the political subdivision, cable service over a cable system, and includes any other political subdivision in which such allegedly noncomplying political subdivision is, or has filed a pending application to become, a public cable service provider."

{¶ 11} TWC's complaint avers in pertinent part that Lebanon's telecommunications ordinances violate R.C. 1332.04(B)(1)(a) and (b), that TWC is a cable service provider within Lebanon, and that TWC is adversely affected as Lebanon's violations of R.C. 1332.04(B) provide an advantage to the city's publicly-owned telecommunications system, contrary to the statutory provisions.

{¶ 12} Having independently and thoroughly examined the complaint and having construed the facts and all inferences therefrom as being true, this court finds that the trial court improperly dismissed the complaint pursuant to Civ.R. 12(B)(6). The instant case does not present a situation in which TWC is unable to prove any set of facts that would entitle it to recovery. All elements of the cause of action have been sufficiently pled and, therefore, this action must be permitted to proceed at the trial court level. As discussed in *Corrigan,* a motion to dismiss is not an opportunity for a trial judge to address the matter on its merits. The sole issue before a trial judge is whether the facts as alleged in the complaint, if construed as true, establish the cause of action provided for in the complaint. The sole requirement to survive a motion to dismiss, which has been met in the present case, is an allegation as to each of the elements of the cause of action.

***3** {¶ 13} In entertaining the constitutional arguments argued by the parties, the trial court exceeded the appropriate scope of review on a motion to dismiss. See *Petrey v. Simon* (1983), 4 Ohio St.3d 154, 156, 447 N.E.2d 1285. All legislation enjoys a presumption of constitutionality and where a matter can be resolved on other grounds, the constitutional question should not be determined. *State, ex rel. Purdy v. Clermont Cty. Bd. of Elections,* 77 Ohio St.3d 338, 345-46, 673 N.E.2d 1351, 1997-Ohio-278; *Rispo Realty & Dev. Co. v. City of Parma* (1990), 55 Ohio St.3d 101, 105, 564 N.E.2d 425. As noted above, a trial court should review a motion to dismiss only to determine if the facts alleged, if true, establish the cause of action provided for in the complaint. *Id.* We further note that there are only two reasons for dismissing a complaint for declaratory judgment pursuant to Civ.R. 12(B)(6): 1.) "where there is no real controversy or justiciable issue between the parties," and 2.) "when the declaratory judgment will not terminate the uncertainty or controversy[.]" *Fioresi et al. v. State Farm*

Mutual Ins. Co. (1985), 26 Ohio App.3d 203, 203-204, 499 N.E.2d 5. Neither reason exists in the present matter.

{¶ 14} We conclude that the trial court erred in granting Lebanon's motion to dismiss and in dismissing TWC's complaint for failure to state a claim upon which relief can be granted. The first assignment of error is sustained and this matter is remanded to the trial court for further proceedings.

{¶ 15} Assignment of Error No. 2:

[2] {¶ 16} "THE TRIAL COURT ERRED IN DENYING TWC'S MOTION FOR SUMMARY JUDGMENT ALLEGING THAT THE ORDINANCE VIOLATES O.R.C. SECTION 1332.04."

{¶ 17} Section 3(B)(2), Article IV of the Ohio Constitution limits appellate jurisdiction to the review of judgments and final orders of lower courts. This section provides:

{¶ 18} "Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies."

{¶ 19} The denial of a motion for summary judgment generally is considered an interlocutory order not subject to immediate appeal. *Stevens v. Ackman,* 91 Ohio St.3d 182, 186, 743 N.E.2d 901, 2001-Ohio-249, citing *Celebrezze v. Netzley* (1990), 51 Ohio St.3d 89, 90, 554 N.E.2d 1292; see, also, *State ex rel. Overmeyer v. Walinski* (1966), 8 Ohio St.2d 23, 222 N.E.2d 312. TWC has not pointed to any exception to this general rule which would permit this court to review the denial of TWC's motion for summary judgment. We consequently lack jurisdiction to consider this issue.

Judgment reversed and remanded.

POWELL, P.J., and VALEN, J., concur.

Ohio App. 12 Dist.,2004.
Home Builders Assn. of Dayton & Miami Valley v. Lebanon
Not Reported in N.E.2d, 2004 WL 1918930 (Ohio App. 12 Dist.), 2004 -Ohio- 4526

END OF DOCUMENT

Exhibit B

Not Reported in N.E.2d, 1999 WL 1037755 (Ohio App. 9 Dist.)
(Cite as: 1999 WL 1037755 (Ohio App. 9 Dist.))

Court of Appeals of Ohio, Ninth District, Lorain County.
Robert TARRY, Appellant,
v.
FECHKO EXCAVATING, INC., Appellee.

No. 98CA007180.
Nov. 3, 1999.

Michael J. Godles, Elyria, Ohio, for Appellant.

Robert G. Hurt, Middleburg Heights, Ohio, for Appellee.

DECISION AND JOURNAL ENTRY

BAIRD.

***1** On the motion of the defendant, Fechko Excavating, Inc., the Lorain County Court of Common Pleas dismissed the suit brought against it by Robert Tarry. Tarry alleged that Fechko had negligently damaged his property when Fechko installed a water line on behalf of the Village of LaGrange. Tarry has appealed from the dismissal.

Tarry has assigned as error that the trial court improperly dismissed his complaint, pursuant to a Civ.R. 12(B)(6) motion, on the basis that it was barred by the statute of limitations.[FN1] We sustain this assignment of error.

FN1. Tarry has assigned three errors, two of which are supporting arguments for the first assignment of error. The second and third assignments of error are that the R.C. 2305.09 statute of limitations begins to run when the wrongdoer is discovered and that *Mills v. White House Trucking Co.* (1974), 40 Ohio St.2d 55, 320 N.E.2d 668, is inapplicable to the instant case. To the extent that these errors are not directly addressed in the disposition of the first assignment of error, they are overruled as moot.

I

According to the complaint filed by Tarry, Fechko installed a water line in 1991 adjacent to a building Tarry owned. Tarry asserted that during the installation Fechko negligently placed the water line on top of Tarry's storm sewer tile, breaking the tile. As a result of the broken tile, Tarry's basement began flooding. The flooding damaged personal property that Tarry stored in his basement, he was forced to spend time draining and cleaning up the basement, and he incurred approximately $6000 in exploratory and repair expenses.

Fechko, without answering the complaint, moved to dismiss the claims against it pursuant to Civ.R. 12(B)(6). It asserted that, pursuant to R.C. 2305.09, the applicable statute of limitations was four years. According to Fechko, if the damage occurred in 1991 and the complaint was not filed until March 24, 1998, the complaint was time barred.

Tarry responded that because the trespass was underground, the statutory period did not begin running until he discovered the wrongdoer. In this case, Tarry asserted that he did not discover that it was Fechko's actions that had caused the flooding until June 25, 1997.

The trial court dismissed the complaint, stating, "The Complaint on its face simply alleges a trespass to realty occurred in 1991, and no facts purporting to extend that statute of limitations were pled."

II

The trial court dismissed Tarry's complaint because he failed to allege facts purporting to extend

the statute of limitations. The burden to plead an affirmative defense is on the defendant, not the plaintiff. See *Strinyi v. Domotor* (Apr. 9, 1997), Summit App. No. 17955, unreported, at 6. Fechko was required to affirmatively set forth the statute of limitations as an affirmative defense in a responsive pleading,. Civ.R. 8(C). This requirement is repeated in Civ.R. 12(B). Civ.R. 12(B) also provides seven additional defenses, including failure to state a claim on which relief can be granted, that may be asserted prior to a responsive pleading. The Supreme Court of Ohio has held specifically that the affirmative defense of *res judicata* may not be raised by motion pursuant to Civ.R. 12(B) because it is not one of the defenses enumerated in Civ.R. 12(B). *State, ex rel. Freeman, v. Morris* (1991), 62 Ohio St.3d 107, 109, 579 N.E.2d 702. Similarly, the affirmative defense of the statute of limitations is not one of the defenses which Civ.R. 12(B) specifically permits to be raised by motion before a responsive pleading. Because of this, dismissal pursuant to Civ.R. 12(B) is not appropriate on the basis of Fechko's assertion that Tarry's complaint is time barred.

***2** Even if we view the dismissal in the manner the trial court did, the action was inappropriately dismissed. A motion to dismiss a complaint pursuant to Civ.R. 12(B)(6) may properly be granted when it appears "beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus. "[A]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Highway Patrol* (1991), 60 Ohio St.3d 143, 145, 573 N.E.2d 1063. The Supreme Court of Ohio has indicated that, "[a] motion to dismiss a complaint under Civ. R. 12(B) which is based upon the statute of limitations is erroneously granted where the complaint *does not conclusively show on its face* the action is barred by the statute of limitations." (Emphasis added.) *Velotta v. Leo Petronzio Landscaping, Inc.* (1982), 69 Ohio St.2d 376, 379, 433 N.E.2d 147. To conclusively show that the statute of limitations bars the action, the complaint must demonstrate both the relevant statute of limitations and the absence of factors which would toll the statute, or make the it inapplicable.

For the sake of this discussion we assume, without deciding, that R.C. 2305.09 contains the appropriate statute of limitations. Pursuant to R.C. 2305.09, the statutory period for an underground trespass does not begin to run until "the wrongdoer is discovered[.]" In his response to the motion to dismiss, Tarry asserted that on or about June 25, 1997, he discovered that Fechko had installed the water line on top of his tile and that this installation was the source of his flooding problems. The dismissal of Tarry's action against Fechko was improper unless the complaint itself, in view of the relevant statute, is inconsistent with this subsequent explanation. It is not, and this explanation, if proven, could toll the commencement of the statute of limitations.

Tarry's assignment of error is sustained.

III

The trial court erred by dismissing Tarry's claims against Fechko pursuant to Civ.R. 12(B)(6), because it is possible for Tarry to establish a set of facts, consistent with his complaint, which would allow him to recover. The judgment of the trial court is reversed, and the cause remanded for further action consistent with this decision.

Judgment reversed and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Elyria Municipal Court, County of Lorain, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this docu-

ment shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

***3** Costs taxed to Appellee.

Exceptions.

SLABY and BATCHELDER, JJ., concur.

Ohio App. 9 Dist.,1999.
Tarry v. Fechko Excavating, Inc.
Not Reported in N.E.2d, 1999 WL 1037755 (Ohio App. 9 Dist.)

END OF DOCUMENT

Exhibit C

C

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Ninth District, Summit County.
Melissa WARREN, Appellant
v.
ESTATE of Gregory M. **DURHAM**, et al., Appellees.

No. 25624.
Decided Dec. 14, 2011.

Background: Driver allegedly injured in accident with another driver, who since died, brought action against the other driver's estate seeking damages against for personal injury, and against insurer, seeking declarations concerning uninsured or underinsured motorist coverage. Insurer filed crossclaim. Estate moved to dismiss on the basis of expired limitations. The Court of Common Pleas, Summit County, No. CV 2010–02–1084, dismissed the claims against the estate. Driver appealed.

Holding: The Court of Appeals, Belfance, P.J., held that the trial court relied on facts outside the complaint when it concluded that the claims were barred, requiring reversal.

Reversed.

West Headnotes

Limitation of Actions 241 ⚿180(7)

241 Limitation of Actions
241V Pleading, Evidence, Trial, and Review
241k180 Demurrer, Exception, or Motion Raising Defense
241k180(7) k. Motion. Most Cited Cases

Trial court relied on facts outside the complaint when it concluded that complaint filed by driver allegedly injured in accident with another driver, who had since died, stated a claim against the estate that was time barred, and that savings statute did not apply, and, thus, complaint was not subject to dismissal for expired limitations, where it did not conclusively fall outside the limitations period, and trial court did not convert the motion to dismiss into one for summary judgment after providing notice to the parties. Rules Civ.Proc., Rule 12(B)(6).

Appeal from Judgment Entered in the Court of Common Pleas, County of Summit, Ohio, Case No. CV 2010–02–1084.Mitchell A. Weisman, Attorney at Law, for Appellant.

Deborah W. Yue and Holly M. Olarczuk–Smith, Attorneys at Law, for Appellees.

BELFANCE, Presiding Judge.

***1** {¶ 1} Plaintiff–Appellant Melissa Warren appeals the judgment of the Summit County Court of Common Pleas dismissing her complaint against Defendant–Appellee the Estate of Gregory M. Durham ("the Estate"). For the reasons set forth below, we reverse.

I.

{¶ 2} On February 17, 2010, Ms. Warren filed a complaint in the Summit County Court of Common Pleas against the Estate and Progressive Direct Insurance Company ("Progressive") alleging that on June 23, 2006, Ms. Warren was injured in a car accident by a vehicle driven by Gregory Durham. Ms. Warren alleged in her complaint that Mr. Durham died on November 17, 2006. The caption of the complaint indicated the case was a re-filed case. Ms. Warren sought damages against the Estate for personal injury and declarations concerning under/uninsured motorists coverage against Progressive and an order requiring Progressive to submit her claim to arbitration.

{¶ 3} Progressive filed an answer and a

crossclaim. Thereafter, the Estate filed a motion to dismiss pursuant to Civ.R. 12(B)(6) asserting that Ms. Warren's claim was barred by the statute of limitations. In addition, the Estate, based upon facts not contained in the complaint, asserted that the savings statute, R.C. 2305.19, was inapplicable. Progressive filed a motion in opposition asserting the savings statute did apply. Likewise, Ms. Warren filed a motion in opposition asserting the savings statute applied and that her complaint was timely. In addition, Ms. Warren attached to her motion in opposition an order from the prior action. The trial court granted the Estate's motion concluding the savings statute did not apply as Ms. Warren failed to commence or attempt to commence the prior action; thus, the trial court dismissed the claims against the Estate. Ms. Warren then filed a motion requesting that the trial court certify its ruling as a final, appealable order pursuant to Civ.R. 54(B). The trial court granted the motion.

{¶ 4} Ms. Warren has appealed, raising a single assignment of error for our review.

II.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S COMPLAINT AND RULING THE COMPLAINT WAS UNTIMELY FILED."

{¶ 5} Ms. Warren asserts in her assignment of error that the trial court erred in dismissing her complaint as untimely. We agree, albeit for reasons other than those articulated by Ms. Warren.

> "In order for a trial court to dismiss a complaint under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted, it must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to the relief sought. The allegations of the complaint must be taken as true, and those allegations and any reasonable inferences drawn from them must be construed in the nonmoving party's favor. Appellate review of a trial court's decision to dismiss a complaint pursuant to Civ.R. 12(B)(6) is de novo." (Internal citations and quotations omitted.) *Ohio Bur. of Workers' Comp. v. McKinley,* 130 Ohio St.3d 156, 956 N.E.2d 814, 2011–Ohio–4432, at ¶ 12.

***2** {¶ 6} "A complaint may be dismissed under Civ.R. 12(B)(6) for failing to comply with the applicable statute of limitations when the complaint on its face conclusively indicates that the action is time-barred." *Id.* at ¶ 13. This Court has previously stated that, in order "[t]o conclusively show that the statute of limitations bars the action, the complaint must demonstrate both the relevant statute of limitations and the absence of factors which would toll the statute, or make [ ] it inapplicable ." *Tarry v. Fechko Excavating, Inc.* (Nov. 3, 1999), 9th Dist. No. 98CA007180, at *2; see, also, *Helman v. EPL Prolong, Inc.* (2000), 139 Ohio App.3d 231, 241, 743 N.E.2d 484 (adopting the above language from *Tarry*). Moreover, "[b]ecause Ohio is a notice pleading state, it suffices that the complaint put[s] defendants on notice of the general claim. It [i]s not necessary to specify facts to defend from a statute of limitations defense." *Irvin v. Am. Gen. Fin., Inc.,* 5th Dist. No. CT2004–0046, 2005–Ohio–3523, at ¶ 29, fn. 11.

{¶ 7} Based upon the arguments made in the motion to dismiss, which rely on facts not contained in the complaint, we cannot say that the face of the complaint conclusively shows Ms. Warren's claim is barred by the statute of limitations. Ms. Warren's complaint does not recite the procedural history of the prior case. Those facts are contained only within the Estate's motion to dismiss and the responses thereto and their attachments. It is clear from the trial court's entry that it relied on facts outside the complaint when it concluded that Ms. Warren's claim against the Estate was time barred and the savings statute did not apply, as the trial court recited the history of the prior action and relied on it in making its determination. This Court has previously stated:

> "In considering a Civ.R. 12(B)(6) motion to dismiss, the trial court must review only the com-

plaint, accepting all factual allegations as true and making every reasonable inference in favor of the nonmoving party. The trial court may not, however, rely upon any materials or evidence outside the complaint in considering a motion to dismiss. Where the trial court chooses to consider evidence or materials outside the complaint, the court must convert the motion to dismiss into a motion for summary judgment and give the parties notice and a reasonable opportunity to present all materials made pertinent to such motion by Civ.R. 56." (Internal citations omitted.) *Cotton v. Anderson,* 9th Dist. No. 06CA008984, 2007–Ohio–6548, at ¶ 5.

In the instant matter, the trial court considered matters outside the complaint and did not convert the motion to dismiss into one for summary judgment after providing notice to the parties. See, also, *Lansing v. Hybud Equip. Co.,* 5th Dist. No.2002CA00112, 2002–Ohio–5869, at ¶¶ 14–17. Accordingly, the trial court erred in dismissing the complaint against the Estate based upon the statute of limitations.[FN1] We therefore sustain Ms. Warren's sole assignment of error.

FN1. We take no position on the merits of the Estate's arguments with respect to the statute of limitations and the savings statute as facts concerning those arguments are not properly before us.

III.

***3** {¶ 8} In light of the foregoing, we reverse the judgment of the Summit County Court of Common Pleas and remand the matter for proceedings consistent with this opinion.

Judgment reversed and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellees.

MOORE and DICKINSON, JJ., Concur.

Ohio App. 9 Dist.,2011.
Warren v. Estate of Durham
Slip Copy, 2011 WL 6211794 (Ohio App. 9 Dist.), 2011 -Ohio- 6416

END OF DOCUMENT

Exhibit D

C

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fifth District, Muskingum County.
Richard IRVIN, et al. Plaintiffs-Appellants
v.
AMERICAN GENERAL FINANCE, INC., et al. Defendants-Appellees

No. CT2004-0046.
June 30, 2005.

Background: Insureds brought action alleging fraud, breach of fiduciary duty, negligence, and violations of the Ohio Corrupt Practices Act, arising from purchases of credit life insurance. The Court of Common Pleas, Muskingum County, No. CH2003-0438, dismissed action, and insureds appealed.

Holdings: The Court of Appeals, Edwards, J., held that:
(1) under parol evidence rule, evidence of alleged oral misrepresentations by insurer or its agents regarding need to purchase insurance was inadmissible to contradict disclosure forms which clearly stated insurance was voluntary;
(2) insureds' signing disclosure form precluded claims that insurer and its agent violated the Ohio Corrupt Practices Act, but not claims for breach of fiduciary duty, negligence, or alleged violation of the Ohio Mortgage Loan Act.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Evidence 157 ⚿434(13)

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(B) Invalidating Written Instrument
157k434 Fraud
157k434(13) k. In contracts of insurance. Most Cited Cases

Under parol evidence rule, evidence of alleged oral misrepresentations by insurer or its agents that certain credit life insurance policies were required to be purchased was inadmissible to contradict disclosure forms which insureds signed and which clearly stated that each of credit life insurance policies purchased by insureds in each of the various transactions were voluntary and not required to be purchased to obtain loans.

[2] Insurance 217 ⚿3424

217 Insurance
217XXVIII Miscellaneous Duties and Liabilities
217k3416 Of Insurers
217k3424 k. Fraud or misrepresentation; concealment. Most Cited Cases

Insureds' signing of disclosure forms which clearly stated that each of credit life insurance policies purchased by insureds in each of the various transactions were voluntary and not required to be purchased to obtain loans precluded claims that insurer and its agent violated the Ohio Corrupt Practices Act by making misrepresentation that insureds were required to purchase insurance to obtain loans. R.C. § 2923.31 et seq.

[3] Consumer Credit 92B ⚿4

92B Consumer Credit
92BI In General
92Bk3 License and Regulation in General
92Bk4 k. Particular businesses or transactions. Most Cited Cases

Insurance 217 ⚿1654

217 Insurance

217XI Agents and Agency
217XI(C) Agents for Insurers
217k1654 k. Duties and liabilities to insureds or other third persons. Most Cited Cases

Insurance 217 ⚿3424

217 Insurance
217XXVIII Miscellaneous Duties and Liabilities
217k3416 Of Insurers
217k3424 k. Fraud or misrepresentation; concealment. Most Cited Cases

Insureds' signing of disclosure forms which clearly stated that each purchase of credit life insurance policies was voluntary and that policies were not required to be purchased to obtain loans did not preclude them from asserting claims against insurer and its agent for breach of fiduciary duty, negligence, or alleged violation of the Ohio Mortgage Loan Act, which claims could be based upon factual allegations separate from issue of whether insureds were told that insurance coverages were required to obtain loans. R.C. § 3121.51 et seq.

[4] Limitation of Actions 241 ⚿180(7)

241 Limitation of Actions
241V Pleading, Evidence, Trial, and Review
241k180 Demurrer, Exception, or Motion Raising Defense
241k180(7) k. Motion. Most Cited Cases

Resolution of whether insureds' Ohio Mortgage Loan Act claim was barred by the applicable statute of limitations was not appropriate on a motion to dismiss for failure to state a claim on which relief could be granted, where insureds did not state the controlling statute of limitations in their complaint nor demonstrate the absence of factors that could toll the statute or make it inapplicable. R.C. § 3121.51 et seq.; Rules Civ.Proc., Rule 12(B)(6).

Civil Appeal from Muskingum County Court of Common Pleas Case CH2003-0438, Affirmed, in part, Reversed, in part, and Remanded.Gary M. Smith, Zanesville, OH, for Plaintiffs-Appellants.

Irene C. Keyse-Walker, Cleveland, OH, Dianna C. Wyrick, Pittsburgh, PA, for Defendants-Appellees.

SHEILA G. FARMER, P.J., JOHN W. WISE, J. and JULIE A. EDWARDS, J.

OPINION

EDWARDS, J.

***1** {¶ 1} Plaintiffs-appellants Richard and Marilyn Irvin [hereinafter appellants] appeal from the October 7, 2004, Judgment Entry of the Muskingum County Court of Common Pleas which granted defendants-appellees', American General Finance, et al. [hereinafter appellees], motion to dismiss.

STATEMENT OF THE FACTS AND CASE

{¶ 2} On August 1, 2003, appellants filed a complaint in the Muskingum County Court of Common Pleas, claiming fraud, breach of fiduciary duty, negligence and violations of the Ohio Corrupt Practices Act, R.C. 2923.31 et seq. The defendants-appellees were American General Finance, Inc. [hereinafter American General], Merit Life Insurance Co. [hereinafter Merit Life], and, as named individuals, Ms. Lay, Ms. Updegrave, and Mr. Fox. The named individuals were life insurance agents and loan officer employees for Merit Life and American General.

{¶ 3} Appellants' complaint was based upon the following factual allegations. Appellants are husband and wife. Neither graduated from high school. Both have very limited reading skills and are unsophisticated as to financial affairs and money management. Appellant Richard Irvin is employed by the Longaberger Company as a custodian and appellant Marilyn Irvin is totally disabled and receives Social Security Disability. Because of their limited income, appellants had obtained numerous small consumer loans over the years.

{¶ 4} From at least October 16, 1995, through August 4, 1999, appellants had a continuing relationship with American General. During that time, appellants had nine loans with American General.

FN1 According to appellants, during the years of the American General relationship, appellants, at the insistence of appellees, were induced to purchase numerous insurance policies from American General, as well as single premium term life insurance policies from Merit Life, a subsidiary of American General.

> FN1. According to the complaint, the loans were dated March 28, 1996; September 6, 1996; February 19, 1997; September 26, 1997; May 8, 1998; November 17, 1998; May 21, 1999; and August 4, 1999.

{¶ 5} In essence, appellants allege in the complaint that they would not have purchased these illegal, expensive, duplicative and unnecessary policies had the defendants truthfully and adequately disclosed that these coverages were illegal and optional, in excess of what appellants could afford, unnecessary and that the defendants, by selling the single premium life insurance policies and/or personal property insurance policies, were violating the Ohio Corrupt Practices Act.

{¶ 6} On October 31, 2003, all appellees moved to dismiss the complaint, without answering, pursuant to Civ. R. 12(B)(6) (failure to state a claim upon which relief can be granted) and (9)(b) (failure to plead fraud with specificity). On December 8, 2003, appellants filed a first amended complaint. The first amended complaint added class action allegations pursuant to Civ. R. 23(B) (2) and 23(B)(3) and an additional claim under Ohio's Mortgage Loan Act, R.C. 1321.51 et seq (formerly known as the Second Mortgage Security Loan Act).

{¶ 7} Subsequently, appellees filed a motion to dismiss appellants' first amended complaint, pursuant to Civ. R. 12(B)(6) and (9)(b). On September 10, 2004, the trial court granted appellees' motion to dismiss the first amended complaint. The trial court's decision was based upon its conclusion that appellants' complaint "centers around the central issue of their allegation they were forced to buy credit life on their loans without being told they had the option of not buying the insurance. As pointed out many times in the [appellees'] motion to dismiss, the loan documents clearly, and in writing, pointed out to the [appellants'] that credit life was optional and they had the right to refuse its purchase." September 10, 2004, Decision. The decision was journalized by an Entry filed October 7, 2004.

***2** {¶ 8} It is from the October 7, 2004, Journal Entry that appellants appeal, raising the following assignments of error:

{¶ 9} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT FOUND BEYOND DOUBT THAT THE IRVINS COULD PROVE NO SET OF FACTS UNDER WHICH A REASONABLE JUROR COULD FIND IN THEIR FAVOR CONCERNING DEFENDANTS-APPELLEES' AFFIRMATIVE FRAUD.

{¶ 10} "II. THE TRIAL COURT ERRED AS A MATTER OF LAW BY GRANTING DEFENDANTS-APPELLEES' RULE 12(B)(6) MOTION TO DISMISS THE IRVINS COMMON LAW NEGLIGENCE AND BREACH OF FIDUCIARY DUTY CLAIMS, AND THEIR STATUTORY OHIO MORTGAGE ACT AND OHIO CORRUPT PRACTICES ACT CLAIMS, SINCE THE LOWER'S [SIC] COURT BELIEF THAT DEFENDANTS HAD "CLEARLY, AND IN WRITING" DISCLOSED AN OPTION NOT TO PURCHASE CREDIT INSURANCE DOES NOT MAKE IT BEYOND DOUBT THAT THE IRVINS CAN PROVE FACTS UNDER WHICH A REASONABLE JUROR COULD FIND IN THEIR FAVOR AS TO THE TERM LIFE AND EXCESS PROPERTY CASUALTY COVERAGES AT ISSUE THEREUNDER."

{¶ 11} This matter reaches this court upon the granting of a motion to dismiss, pursuant to Civ. R. 12(B)(6), failure to state a claim upon which relief can be granted.FN2 We review a grant of a Civ.R. 12(B)(6) motion to dismiss de novo. *Greely v. Miami Valley Maintenance Contrs. Inc.* (1990), 49 Ohio St.3d 228, 551 N.E.2d 981. A motion to dis-

miss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 605 N.E.2d 378, 1992-Ohio-73. Under a de novo analysis, we must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Byrd. v. Faber* (1991), 57 Ohio St.3d 56, 565 N.E.2d 584. In order for the trial court to dismiss a complaint pursuant to Civ.R. 12(B)(6), the court must find beyond a doubt that the plaintiff can prove no set of facts that would support his claim for relief. *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753.

FN2. Civ. R. 12(B)(6) states as follows: "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 or Rule 19.1...."

{¶ 12} We now turn to appellants' assignments of error.

I

[1] {¶ 13} In the first assignment of error, appellants contend that the trial court erred when it found that appellants could prove no set of facts that would support any claim for relief concerning the claim of affirmative fraud.[FN3] We disagree.

FN3. We note that appellants' assignment of error actually alleges that the trial court erred when it found beyond doubt that appellants could prove no set of facts under which a reasonable juror could find in their favor concerning their claim of affirmative fraud. This assignment of error incorporates the wrong standard of review. Considerations of whether reasonable jurors could find in plaintiff's favor is relative to motions for summary judgment, Civ. R. 56(C), not motions to dismiss, Civ. R. 12(B). However, appellants argue the proper standard of review, which focuses on whether plaintiffs can prove a set of facts that would support their claim, in their argument. Accordingly, this Court has altered the recitation of appellants' first assignment of error to reflect the correct standard of review.

{¶ 14} In essence, appellants contend that appellees committed fraud when it was falsely represented that certain insurance policies were required to be purchased from appellees when, in actuality, they were optional.[FN4] However, appellants admit in the complaint that they signed papers "which attempted to insulate the Defendants from their illegal actions." Appellees argue that once appellants signed the papers, otherwise referred to as disclosures, which stated that the purchases of the various insurances were optional and voluntary, any claim based upon alleged oral misrepresentations or omissions that contradict the written terms of the disclosures signed by appellants could not be sustained as a matter of law.

FN4. In their first amended complaint, appellants asserted the following claim:

"68. Defendants Mitchell, Fox, Updegrave and John Does 1-10, acting in the course and scope of their employment with American General and as agent for Defendants Merit and John Does 11-20, at the Maple avenue [sic] offices of Defendant American General on March 28, 1996, September 6, 1996, February 19, 1997, September 26, 1997, May 8, 1998, November 17, 1998, May 21, [1999] and

August 4, 1999, which took place at the Maple Avenue, Zanesville office of Defendants, falsely represented certain single premium life insurance policies and/or personal property insurance policies, were legal and had the Plaintiffs sign papers in fine print of the loan the documents which attempted to insulate the Defendants from their illegal actions by stating to the Plaintiffs that said policies were legal and were required if Plaintiffs were to obtain these loans.

"69. Defendants Mitchell, Fox, Updegrave and John Does 1-10 acting in the course and scope of their employment with American General and as agents for defendants Merit, and John Does 11-20 also fraudulently concealed charges for other and additional insurance policies by presenting plaintiffs with the above loan documents in response to plaintiffs' request for a simple loan, when Mitchell, Fox, and Updegrave knew or should have known these policies and additional charges were included in those transactions, that plaintiffs never requested the policies, and that plaintiffs were not aware or made aware that those policies and the charges for them were optional or included in the transaction.

"70. These misrepresentations and concealment on March 28, 1996, September 6, 1996, February 19, 1997, September 26, 1997, May 8, 1998, November 17, 1998, May 21, [1999] and August 4, 1999, at the Maple Avenue, Zanesville office were fraudulent and were intended to induce plaintiffs to rely thereupon by signing the loan documents, thereby purchasing such policies without plaintiffs' knowledge or contractual intent, all to plaintiffs' financial detriment and the defendants' financial benefit.

"71. These misrepresentations and illegal acts and acts of concealment did wrongfully induce Plaintiffs unknowingly to purchase and pay for illegal policies and policies and charges which would not have been purchased or paid for save for their reasonable reliance thereupon.

"72. The fraudulent actions complained of herein caused plaintiffs' injury, including the amount of the policy premiums and the finance and other charges attributable thereto.

"73. Further, these actions were illegal, knowing, intentional, and deliberate, taken in reckless disregard of the plaintiffs' rights and interests, and/or of defendants' duties and obligations, so as to constitute malice under law." First Amended Complaint, Count Four, Fraud."

***3** {¶ 15} Appellees essentially argue that appellants' fraud claim is barred by the parole evidence rule, citing *Wakeman Oil Co. ., Inc. v. Citizens Nat'l Bank of Norwalk* (September 13, 1996), Huron App. No. H-95-045. [FN5] "The parol evidence rule states that 'absent fraud, mistake or other invalidating cause, the parties' final written integration of their agreement may not be varied, contradicted or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements." ' *Galmish v. Cicchini,* 90 Ohio St.3d 22, 27, 734 N.E.2d 782, (quoting 11 Williston on contracts (4th Ed.1999) 569-570, Section 33:4). Generally, the parol evidence rule does not prohibit a party from introducing parol or extrinsic evidence for the purpose of proving fraudulent inducement." Id. "However, the parol evidence rule may not be avoided 'by a fraudulent inducement claim which alleges that the inducement to sign the writing was a promise, the terms of which are directly contra-

dicted by the signed writing. *Marion Prod. Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265, 533 N.E.2d 325, paragraph three of the syllabus. In other words, "[t]he Parol Evidence Rule will not exclude evidence of fraud which induced the written contract. But, a fraudulent inducement case is not made out simply by alleging that a statement or agreement made prior to the contract is different from that which now appears in the written contract. Quite to the contrary, attempts to prove such contradictory assertions is exactly what the Parol Evidence Rule was designed to prohibit." *Wall v. Planet Ford, Inc.,* 159 Ohio App.3d 840, 850, 825 N.E.2d 686, 2005-Ohio-1207.

FN5. Appellees raise numerous other arguments. However, as we find the above reasoning to be dispositive, these other arguments will not be addressed.

{¶ 16} Appellants' fraud claims are based upon allegations that they were orally told that certain insurance coverages were required to be purchased in order to obtain the loans they sought, when, in fact, the insurance coverages were not required. A review of the complaint and documents supplied by appellee as attachments to their motion to dismiss and which were incorporated into the complaint, show that appellants signed disclosure forms which clearly stated that each of the insurance policies purchased by appellants in each of the various transactions were voluntary and not required to be purchased from appellees in order to obtain the loan(s).[FN6] Thus, appellants seek to directly contradict the written terms of disclosures. Such a claim cannot be sustained, as a matter of law. Accordingly, the trial court did not error when it granted appellant's motion to dismiss the fraud claim.

FN6. When considering a motion to dismiss made pursuant to Civ. R. 12(B)(6), a court's review is limited to the complaint and documents attached to the complaint. Not all of the documents reviewed in this matter were attached to the complaint. Some of the relevant disclosures were provided by appellees as attachments to their motion to dismiss. However, it is appropriate to review documents that were incorporated into the complaint, even if not attached to the complaint. *Fillmore v. Brush Wellman, Inc.,* Ottawa App. OT-03-029, 2004-Ohio-3448 (citing *Connolly Constr. Co. v. The City of Circleville* (Mar. 16, 1988), 3rd Dist. No. 9-87-10; *Weiner v. Klais & Co.* (C.A.6, 1997), 108 F.3d 86, 89). The disclosures provided by appellees had been incorporated into the complaint by appellants when they referred to signing disclosures and provided copies of the accompanying loan documents as attachments.

{¶ 17} Appellants' first assignment of error is overruled.

II

{¶ 18} In the second assignment of error, appellants argue that the trial court erred when it granted appellee's Civ. R. 12(B)(6) motion on appellants' claims alleging negligence, breach of fiduciary duty, violation of the Ohio Mortgage Loan Act and violation of the Ohio Corrupt Practices Act claims. Appellants' arguments are primarily focused on an argument that the trial court's stated reason for dismissing the remaining claims is error. The trial court, in its September 10, 2004, Decision, found that all of appellants' claims should be dismissed because appellants signed disclosures which showed that the insurance coverages were optional and appellants had the right to refuse their purchase. Appellants contend that this rationale does not prevent them from obtaining relief, as a matter of law on their claims of negligence, breach of fiduciary duty, violation of the Mortgage Loan Act and violation of the Corrupt Practices Act. Appellees present various arguments in support of the trial court's decision.

***4** {¶ 19} We will first address appellants' argument that the trial court was wrong when it found that appellant's claims of negligence, breach of fi-

duciary duty, violation of the Ohio Corrupt Practices Act and violation of the Ohio Mortgage Loan Act were all based upon the assertion that appellees made a misrepresentation that they were required to purchase the various insurances in order to obtain the loans. Appellees argued and the trial court agreed that each of these claims should be dismissed because appellants signed disclosures that clearly stated that the purchases of the various policies were optional and voluntary.

[2] {¶ 20} We find that the trial court was correct when it found that appellants' claim that appellees violated the Ohio Corrupt Practices Act should be dismissed on this basis.[FN7] In this count, appellants asserted that appellees failed to inform appellants that the insurances purchased by appellants were optional and voluntary and fraudulently concealed the charges for the insurance policies. However, as discussed in assignment of error I, appellees disclosed that the purchases of these insurance policies were voluntary and not required to be purchased from appellees in order to obtain the loans. Further, a review of the complaint and the documents attached to or incorporated into the complaint demonstrates that the premiums for these optional insurance policies were disclosed. Accordingly, it was not error to grant the appellees' motion to dismiss on the count concerning violation of the Ohio Corrupt Practices Act.

> FN7. In the count concerning violation of the Ohio Corrupt Practices Act, appellants allege the following:
>
> "74. Defendants regularly conduct business through an association in fact involving American General Finance Inc, Merit Life Insurance Company, John Does 11-20, the individually named defendants, John Does 1-10 and others as active participants on behalf of various third party insurance companies.
>
> "75. Defendants therefore engage in the business of insurance solicitation and sale as and through an enterprise as defined in Revised Code [section] 2923.31.
>
> "76. The affairs of this enterprise customarily involve the use of the mails and other means of interstate commerce including telephone and date transmission lines.
>
> "77. In their dealings with plaintiffs, defendants conducted the affairs of the enterprise through actions which constituted mail fraud, wire fraud, theft and extortion. These corrupt acts included but are not limited to fraudulent concealment and fraudulent charges for policy premiums and false representations on loan documents relating to federally insured mortgage loans, involving amounts in excess of $500.00.
>
> "78. Defendants have therefore conducted the affairs of this enterprise through a pattern of corrupt activity in violation of Revised Code [section] 2923.24." First Amended Complaint, Count Five, Corrupt Practices Act.

[3] {¶ 21} However, we find that appellees' argument fails in regard to the claims concerning the alleged violation of the Ohio Mortgage Loan Act and the breach of fiduciary duty and negligence claims.

{¶ 22} The Ohio Mortgage Loan Act, R.C. 3121.51 et seq., limits insurance coverages that may be required or offered by registrants who hold licenses under the Act. Appellants asserted in their complaint that American General is licensed under the Act and thereby required to comply with the Act. Appellants contend that American General sold insurance coverages not permitted by the Act.[FN8]

> FN8. Specifically, appellants allege the

following in their complaint:

> "53. All loans made to, payments received under, and the refinancings undertaken by Plaintiffs and the class members were subject to Ohio's Second Mortgage Security Act O.R.C. [Sec.] 1321.51-1321.60.
>
> "54. Defendant American General has obtained a license under the Second Mortgage Loan Act which prohibits it from engaging in lending practices which violate that Act, including the sale, imposition or collection of interest, fees, commissions, costs, or charges for insurance products other than those expressly authorized by statute in such loan transactions.
>
> "55. O.R.C. [Sec.] 1321.57 sets forth the only types of insurance that can be sold in a Second Mortgage Loan transaction and therefore limits the interest, fees, commissions, costs, or charges than can lawfully be imposed upon such borrowers, to:
>
> "A registrant, at the request of the borrower, may obtain, on one or more borrowers, credit life insurance, credit accident and health insurance, and unemployment insurance ... O.R.C. [Sec.] 1321.57
>
> "56. On information and belief, Defendants willfully and customarily violate the duties and the proscriptions of the Second Mortgage Loan Act and O.R.C. [Sec.] 1321.57 in these loan transactions by selling, charging for, and receiving charges for other and additional types of excess insurance not expressly allowed by Sec. 3127.57, including single premium life insurance policies not constitution [sic] "credit life insurance" and/or personal property insurance on household goods as to which American General can take no valid security interest.
>
> "57. This continuous course of conduct on and after December 8, 1997 was also illegal, fraudulent and a corrupt practice." First Amended Complaint, Count One.

{¶ 23} We find that the disclosure forms do not form a basis to dismiss appellant's count alleging a violation of Ohio's Mortgage Loan Act. Just because appellees disclosed the fact that the insurance policies purchased were optional and voluntary and disclosed the costs associated with those policies, does not mean that American General could sell the insurance policies without violating the Mortgage Loan Act.

{¶ 24} Likewise, we do not find that the disclosure forms mandate a dismissal of the claims concerning breach of a fiduciary duty [FN9] and negligence. [FN10] In analyzing this issue, we will address another issue raised by appellees as a reason to dismiss these two claims. Specifically, appellees also contend that appellants' claims must be dismissed because American General owed no duty to appellants. Thus, because appellants, as plaintiffs, must prove the existence of a duty to succeed on a claim of breach of fiduciary duty or negligence, appellees argue that because there is no such duty, appellants cannot prove a set of facts that would entitle them to relief.

> FN9. Appellants' complaint states the following claims:
>
> BREACH OF FIDUCIARY DUTY
>
> "58. Plaintiffs are unsophisticated in financial matters and have limited ability to accurately identify or understand all but the simplest financial transactions.
>
> "59. This fact is or should be apparent to any person attempting to engage them in

any such transactions.

"60. Defendants Mitchell, Fox, Updegrave and John Does 1-10, in the course and scope of their employment with Defendant American General, and as INSURANCE agents for defendants Merit and John Does 11-20 knew or should have known for that reason and from their course of dealing with the Plaintiffs prior to and during the transactions at issue, that as a result of the above plaintiffs were required to and reasonably did repose special trust and confidence in them to advise and deal with Plaintiffs honestly and in accord with their best interests.

"61. These Defendants therefore knew or should have known that they stood in a position of superiority and advantage as to Plaintiffs' dealings with defendants.

"62. For these reasons, in undertaking to identify, select, procure, and sell various illegal insurance products presumably for Plaintiffs' benefit or protection but at their cost, defendants American General, Mitchell, Fox, Updegrave, John Does 1-20, and Merit Life owed plaintiffs the duty of fiduciaries. See *Stone v. Davis* (1982), 66 Ohio St.2d 74, 419 N.E.2d 1094.

"63. The Defendants continuing course of conduct from October 16, 1995 through August 4, 1999, by selling illegal single premium life insurance and personal property insurance policies, using subsequent loans to pay off said premiums, and/or to sell new single premium life insurance policies and/or personal property insurance policies, as well as other actions or failure to act complained of above, breached these duties in that the policies and coverage selected and included in these financial transactions were illegal and unconscionable.

"64. However, because of plaintiffs' limitations and lack of sophistication it was not until plaintiffs sought the advice of counsel on a different matter in November 2000 that they first learned of the Defendants' illegal actions and breach of these duties.

"65. Defendants' continuing and ongoing illegal and tortious conduct and violation of these duties caused plaintiffs injury, including but not limited to the policy premiums and the finance and other charges attributable thereto.

"66. Further, these actions were knowing, intentional, and deliberate, as well as illegal, and taken in reckless disregard of the Plaintiffs' rights and interests, and/or of defendants' duties and obligations, so as to constitute malice under law." First Amended Complaint, Count Two.

FN10. In the negligence count, appellants allege that "[t]he actions or failure to act of Defendants while acting as licensed insurance agents for Merit Life in relation to the matters in which plaintiffs were in privity with defendants breached duties owed Plaintiffs as a matter of law, and were also negligent and/or grossly negligent, causing Plaintiffs to suffer direct economic injury. No claim is made for recovery of any indirect economic losses." First Amended Complaint, Count Three.

***5** {¶ 25} Appellees cite several cases for the proposition that American General did not owe a duty to appellants, fiduciary or otherwise. See *Blon v. Bank One, Akron, N.A.* (1988), 35 Ohio St.3d 98, 101, 519 N.E.2d 363; *Kingston Nat'l Bank v. Stulley* (Sept. 28, 1990), Pike App. No. 443, 1990 WL

155741. Admittedly, the general rule is that a relationship of debtor and creditor, without more, is not a fiduciary relationship and no duty is owed by the creditor to the debtor. However, in their complaint, appellants cite to the case of *Stone v. Davis* (1982), 66 Ohio St.2d 74, 419 N.E.2d 1094, for the proposition that American General and Merit Life owed appellants a fiduciary duty. In *Stone,* the Ohio Supreme Court held that, under a limited factual situation, a fiduciary relationship could be created between a creditor and debtor when the debtor is seeking a loan. Although this exception to the general rule that a creditor does not owe a duty to a debtor is very narrow, it becomes a factual question as to whether appellants can establish that a fiduciary duty arose. As such, we find that the granting of the motion to dismiss was not appropriate, as a duty could have been created.

{¶ 26} We find this argument equally applicable to appellants' negligence claim. In the negligence claim, appellants allege that the licensed insurance agents of Merit Life violated their duty to appellants. In *Wanner Metak Worx, Inc. v. Hylant-Maclean, Inc.* (April 7, 2003), Delaware App. No. 02CAE10046, 2003-Ohio-1814, this court recognized that a duty of care can arise between an insurance agency and their customer when the agency knows that the customer is relying upon the agency's expertise. Accordingly, it becomes a factual issue as to whether appellants and appellees had such a relationship. Thus, it was inappropriate to grant the motion to dismiss on the negligence count.

{¶ 27} That leads us back to the issue as to whether the disclosures signed by appellants bar the negligence or breach of fiduciary duty claims. These claims could be based upon factual allegations separate from the issue of whether the appellants were told that the insurance coverages were required in order to obtain the loans. The claims could be based upon breaches of the fiduciary duty not related to those alleged misrepresentations. Thus, until the factual basis of these claims is established, it is possible that appellants could state a claim upon which they could be entitled to relief.

[4] {¶ 28} Appellees raise one additional, relevant issue in support of the trial court's decision. Appellees argue that the Ohio Mortgage Loan Act claim is barred by the applicable statute of limitations. Appellants respond that an assertion that the statute of limitations has run is an affirmative defense and that a Civ. R. 12(B)(6) motion is not the correct vehicle in which to raise such an affirmative defense.

{¶ 29} We agree with appellants that it was not appropriate in this case to dismiss the Mortgage Loan Act claim based upon a statute of limitations argument. This affirmative defense is generally not properly raised in a Civ.R. 12(B)(6) motion, as it also typically requires reference to materials outside the complaint. *Steiner v. Steiner* (1993), 85 Ohio App.3d 513, 518, 620 N.E.2d 152. Only when a violation of the statute of limitations is apparent from the face of the complaint may such an affirmative defense be raised in a Civ.R. 12(B)(6) motion. *Helman v. EPL Prolong, Inc.* (2000), 139 Ohio App.3d 231, 241, 743 N.E.2d 484; *Ware v. Kowars* (Jan. 25, 2001), Franklin App. No. 00AP-450. For there to be a conclusive showing in that regard, the complaint must show both: (1) the relevant statute of limitations; and (2) the absence of factors which would toll the statute or make it inapplicable. *Id.* FN11

> FN11. Because Ohio is a notice pleading state, it suffices that the complaint put defendants on notice of the general claim. It was not necessary to specify facts to defend from a statute of limitations defense. *Mills v. Deehr,* Cuyahoga App. No. 82799, 2004-Ohio-2338.

***6** {¶ 30} In the present case, appellants did not state the controlling statute of limitations in their complaint nor demonstrate the absence of factors that any might toll the statute or make it inapplicable.[FN12] As such, we find that appellees'

argument in support of the trial court's decision fails.

> FN12. In this case, the parties disagree as to the length of the applicable statute of limitations and whether there is a means by which the statute of limitations would be a means by which the statute of limitations could be tolled. However, as these issues are beyond the face of the complaint, this court cannot address those issues at this point.

{¶ 31} Accordingly, appellant's second assignment of error is sustained, in part, and overruled, in part.

{¶ 32} Upon due consideration of the arguments presented by the parties, we find that appellants' claims for negligence, breach of fiduciary duty and violation of the Ohio Mortgage Loan Act should not have been dismissed pursuant to Civ. R. 12(B)(6). Thus, to that extent, the trial court's Judgment Entry is reversed. The portion of the trial court's Judgment Entry that dismisses appellants' claims for fraud and the alleged violation of the Ohio Corrupt Practices Act is affirmed.

{¶ 33} The judgment of the Muskingum County Court of Common Pleas is affirmed, in part, and reversed, in part. This matter is remanded for further proceedings consistent with this Opinion.

FARMER, P.J. and WISE, J. concur.

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Muskingum County Court of Common Pleas is affirmed, in part, and reversed, in part. This matter is remanded for further proceedings consistent with this Opinion. Costs assessed 50% to appellant and 50% to appellee.

Ohio App. 5 Dist.,2005.
Irvin v. Am. Gen. Fin., Inc.
Not Reported in N.E.2d, 2005 WL 1607460 (Ohio App. 5 Dist.), 2005 -Ohio- 3523

END OF DOCUMENT

Exhibit E

H

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Second District, Montgomery County.
Mahdi AL–MOSAWI, Plaintiff–Appellant
v.
Phil PLUMMER, et al., Defendant–Appellee.

No. 24985.
Decided Dec. 21, 2012.

Background: Former inmate filed suit against county sheriff arising out of injuries he sustained when fellow inmate beat him, asserting § 1983, personal injury, and damages claims. The Court of Common Pleas, T.C. No. 09CV9079, granted summary judgment to sheriff. Former inmate appealed.

Holdings: The Court Court of Appeals, Joseph J. Vukovich, J., sitting by assignment, held that:
(1) statute tolling limitations period when litigant is of unsound mind did not apply to toll two-year limitations period applicable to former inmate's claims;
(2) discovery rule did not apply to toll two-year limitations period applicable to former inmate's claims; and
(3) rule governing relief from judgment could not be used by former inmate to foreclose summary judgment against him.

Affirmed.

West Headnotes

[1] Limitation of Actions 241 ⚿74(1)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(C) Personal Disabilities and Privileges
241k74 Insanity or Other Incompetency
241k74(1) k. In General. Most Cited Cases

Statute tolling limitations period when litigant is of unsound mind did not apply to toll two-year limitations period applicable to former inmate's § 1983, personal injury, and damages claims against county sheriff, arising out of injuries he sustained when fellow inmate beat him, where former inmate presented no evidence that he was of unsound mind, and fact that former inmate was not born in the United States, purportedly did not understand or speak English, and did not know United States law did not render him of unsound mind. 42 U.S.C.A. § 1983; R.C. §§ 2305.16, 2744.04.

[2] Limitation of Actions 241 ⚿95(4.1)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k95 Ignorance of Cause of Action
241k95(4) Injuries to the Person
241k95(4.1) k. In General. Most Cited Cases

Limitation of Actions 241 ⚿95(15)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k95 Ignorance of Cause of Action
241k95(15) k. Civil Rights. Most Cited Cases

Discovery rule did not apply to toll two-year limitations period applicable to former inmate's § 1983, personal injury, and damages claims against county sheriff, arising out of injuries he sustained when fellow inmate beat him, as former inmate knew of the assault when it occurred, and, thus, knew of his injury and the facts surrounding it. 42 U.S.C.A. § 1983; R.C. §§ 2305.16, 2744.04.

[3] Judgment 228 ⚿181(5.1)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(5) Matters Affecting Right to Judgment
228k181(5.1) k. In General. Most Cited Cases

Rule governing relief from judgment when there is either excusable neglect, newly discovered evidence, or fraud by the adverse party was not available as an avenue to be used by former inmate to foreclose summary judgment against him in his suit against county sheriff alleging § 1983, personal injury, and damages claims arising out of injuries he sustained when fellow inmate beat him; this rule was to be used by a party seeking to vacate a final order, and even if rule applied, none of the reasons for vacating a final order even applied to former inmate's case. 42 U.S.C.A. § 1983; R.C. §§ 2305.16, 2744.04; Rules Civ.Proc., Rule 60(B)(1), (2), (3).

Civil appeal from Common Pleas Court.Mahdi Al–Mosawi, Chillicothe, OH, Plaintiff–Appellant.

Victoria E. Watson, Assistant Prosecuting Attorney, Dayton, OH, for defendant-appellee.

VUKOVICH, J. (by assignment).

***1** {¶ 1} Plaintiff-appellant Mahdi Al–Mosawi appeals from the decision of the Montgomery County Common Pleas Court granting Defendant–Appellee Phil Plummer's (Montgomery County Sheriff) motion for summary judgment. The argument raised in this appeal is whether the two-year statute of limitations for the claims he is asserting against the Montgomery County Sheriff are tolled either because Al–Mosawi was incompetent under R.C. 2305.16 or should be tolled due to his alleged limited ability to speak and understand English and the laws of this country.

{¶ 2} For the reasons expressed below, the statute of limitations was not tolled. Thus, the trial court's grant of summary judgment for Plummer is hereby affirmed.

STATEMENT OF THE CASE

{¶ 3} On November 6, 2009, Al–Mosawi filed a complaint against Plummer, the Sheriff of Montgomery County, Ohio, alleging that on October 27, 2007, he was severely beaten by inmate Jeffrey Burney while housed at the Montgomery County Jail. The injuries included a head injury that required hospital treatment for the placement of a metal plate in Al–Mosawi's skull. Al–Mosawi claims that the Sheriff violated his civil rights and that the sheriff's actions constituted a dereliction of duty, negligence, and careless indifference.

{¶ 4} In December 2009, Plummer filed a Civ.R. 12(B)(6) motion to dismiss asserting that the claims were barred by the statute of limitations.

{¶ 5} Al–Mosawi filed a motion in opposition to the motion to dismiss claiming that he attempted to file his complaint on October 22 or 23, 2009, but it was returned from the Clerk's office as unfiled on October 24, 2009.

{¶ 6} The matter was referred to a magistrate. The magistrate converted the motion to dismiss into a motion for summary judgment because it was not clear on the face of the complaint whether the statute of limitations had run. The date of the filing of the complaint was one of the concerns addressed in the magistrate's opinion. Converting the motion allowed Al–Mosawi the opportunity to rebut the presumption that the complaint was filed on November 6, 2009.5/3/10 J.E. Furthermore, the magistrate also discussed the potential applicability of the unsound mind tolling provision in R.C. 2305.16. Thus, the conversion into a summary judgment motion provided Al–Mosawi time to present evidence that R.C. 2305.16 was applicable and that it tolled the statute of limitations.

{¶ 7} Plummer filed objections to the magistrate's decision. After reviewing the objections, the trial court adopted the magistrate's decision and

concluded that the summary judgment motions were ripe for review. 4/4/2011 J.E.

{¶ 8} Al–Mosawi appealed the trial court's decision; the appeal was dismissed for lack of a final appealable order.

{¶ 9} Thereafter, the parties filed additional motions for summary judgment and opposition motions. In these motions Al–Mosawi conceded that he incorrectly stated that the date of the assault was October 27, 2007, when in fact it occurred on September 29, 2007.

***2** {¶ 10} On October 20, 2011, the magistrate issued its decision and granted summary judgment for Plummer. It stated that the statute of limitations for the claims raised was two years. It then found that Al–Mosawi did not rebut the presumption that the complaint was filed on November 6, 2009. Furthermore, it found that Al–Mosawi did not present any evidence that the statute of limitations was tolled under R.C. 2305.16. Consequently, the magistrate found that the claims were barred by the statute of limitations.

{¶ 11} Al–Mosawi filed objections. The trial court overruled the objections and adopted the magistrate's decision in full. 12/20/11 J.E. Al–Mosawi then filed a request for findings of fact and conclusions of law. The trial court overruled the motion. 1/6/12 J.E. Al–Mosawi filed a timely appeal.

ASSIGNMENT OF ERROR

> Appellant respectfully submits with his single assignment of error that the trial court under the unique circumstances of this case denied him due process and equal protection of the law under the 14th and 1 st Amendments of the United States Constitution when (1) the trial court granted defendant's motion for summary judgment, and (2) when the trial court refused Plaintiff's timely request for findings of facts and conclusion of law * * * after Plaintiff supplied the court with additional information in an objection, as such the trial court abused its discretion, by committing plain error.

{¶ 12} The arguments made in the appellant's brief focus solely on the trial court's grant of summary judgment in Plummer's favor. The arguments do not address the trial court's denial of the motion for findings of fact and conclusions of law. Thus, our review will primarily focus on the propriety of the summary judgment ruling.

{¶ 13} When reviewing a trial court's grant of summary judgment, an appellate court conducts a *de novo* review. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). In conducting a *de novo* review we use the same standard that the trial court should have used, which is found in Civil Rule 56(C). *Powell v. Rion,* 2d Dist. Montgomery No. 24756, 2012–Ohio–2665, ¶ 6 (2d Dist.). That rule provides that summary judgment is proper when: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. Civ.R. 56(C). *See also Smith v. Kelly,* 2d Dist. Clark No.2011 CA 77, 2012–Ohio–2547, ¶ 15 .

{¶ 14} Plummer argued and the trial court found that the claims asserted are barred by the statute of limitations. The claims raised in the complaint are a 42 U.S.C. § 1983 civil rights claim, a personal injury claim based on negligence, and an action against a political subdivision to recover damages for an injury that occurred in connection with a governmental or proprietary function. All these of these claims have a two-year statute of limitations. *Gessner v. Schroeder,* 2d Dist. Montgomery No. 21498, 2007–Ohio–570, ¶ 63 (law clear that two-year statute of limitations applies to claims brought under 42 U.S.C. § 1983), citing *Browning v. Pendleton,* 869 F.2d 989, 992 (6th Cir.1989); R.C. 2305.16 (statute of limitations for

personal injury is two years); R.C. 2744.04 (two-year statute of limitations for injury done by a political subdivision in connection with a governmental or proprietary function).

***3** {¶ 15} As aforementioned, Al–Mosawi concedes and Plummer agrees that the assault causing the injuries occurred on September 29, 2007. Two years from that date is September 29, 2009. The time-stamped date on the complaint is November 6, 2009. Al–Mosawi offered no evidence to rebut this as being the date of filing. Accordingly, the trial court's conclusion that the complaint was filed outside the two-year time limit is correct.

{¶ 16} Although the complaint was filed 38 days beyond the two-year statute of limitations, Al–Mosawi contends that it should still be deemed timely because the limitations period was tolled due to either him being of unsound mind as contemplated by R.C. 2305.16 and/or because he was not born in the United States ("Iraqis (sic) born") and has little understanding of English or the laws of this country.

{¶ 17} R.C. 2305.16 tolls the statutes of limitation when the plaintiff experiences the condition of an unsound mind. *Thomas v. Progressive Cas. Ins. Co., Inc.,* 2011–Ohio–6712, 969 N.E.2d 1284, ¶ 27 (2d Dist.).

{¶ 18} " 'Of unsound mind' includes all forms of mental retardation or derangement." R.C. 1.02(C). "Courts have held that such conditions, when they occur simultaneously with accrual of the cause of action concerned, may be found to have existed 'at the time the cause of action accrues' for purposes of R.C. 2305.16." *Thomas* at ¶ 29, citing *Bowman v. Lemon,* 115 Ohio St. 326, 154 N.E. 317 (1926) and *Almanza v. Kohlhorst,* 85 Ohio App.3d 135, 619 N.E.2d 442 (3d Dist.1992). This means that the limitations period is tolled from that date and does not resume until "after the disability is removed." R.C. 2305.16. It is the plaintiff's burden to show that he suffered "some species of mental deficiency or derangement [that caused him] to be unable to look into his affairs, properly consult with counsel, prepare and present his case and assert and protect his rights in a court of justice." *Thomas* at ¶ 29, quoting *Lemon* at paragraph three of the syllabus.

{¶ 19} We have also noted that the condition of unsound mind implies "a much more profound disturbance of mental faculties than the 'moderate to serious deficit in social and occupational functioning.' " *Id.* at ¶ 34, 154 N.E. 317. The Ohio Supreme Court observed that a "nebulous assertion of emotional distress does not create an issue of fact concerning unsound mind." *Fisher* at 488.

[1] {¶ 20} Here, Al–Mosawi did not provide the trial court with any evidence that he was of unsound mind.

{¶ 21} Furthermore, we cannot conclude that the fact that Al–Mosawi was not born in the United States, who purportedly does not speak or understand English, and who does not know the laws of this country renders him of unsound mind. Those facts, alone, do not amount to "mental retardation or derangement." Some individuals who do not understand English or the laws may have a "mental retardation or derangement" that would constitute being of unsound mind. However, the sole fact that a person is from another country and does not understand the language or laws of this land does not constitute being of an unsound mind.

***4** [2] {¶ 22} That said, there is the discovery rule which in some instances tolls the statute of limitations. It has been explained that the discovery rule, in general, provides that a "cause of action accrues for purposes of the governing statute of limitations at the time when the plaintiff discovers or, in the exercise of reasonable care, should have discovered the complained of injury." *Investors REIT One v. Jacobs,* 46 Ohio St.3d 176, 179, 546 N.E.2d 206 (1989). The discovery rule's purpose is to limit the "unconscionable result to innocent victims who by exercising even the highest degree of care could not have discovered the cited wrong. By focusing

on discovery as the element which triggers the statute of limitations, the discovery rule gives those injured adequate time to seek relief on the merits without undue prejudice to * * * defendants." *Barr v. Lauer,* 8th Dist. Cuyahoga No. 92497, 2009–Ohio–5563, ¶ 28, quoting *Ault v. Jasko,* 70 Ohio St.3d 114, 115–116, 1994–Ohio–376, 637 N.E.2d 870. Thus, the rule requires the court to consider whether the plaintiff knew that he had a cause of action or *reasonably should have known. Id.* at ¶ 29, 637 N.E.2d 870.

{¶ 23} Furthermore, courts have held that it is knowledge of the facts, not legal theories, which starts the running of the statute of limitations. *Hershberger v. Akron City Hosp.,* 34 Ohio St.3d 1, 5, 516 N.E.2d 204 (1987). *See also Hicks v. Garrett,* 5th Dist. Stark No.2011CA00109, 2012–Ohio–3560, ¶ 117. Ignorance of the law does not toll the statute of limitations. *Lynch v. Dial Finance Co. of Ohio No. 1, Inc.,* 101 Ohio App.3d 742, 748, 656 N.E.2d 714 (8th Dist.1995). *See also Egger v. Soltesz,* 6th Dist. Erie No. E–10–029, 2011–Ohio–1843, ¶ 22; *Sharp v. Ohio Civil Rights Comm.,* 7th Dist. Mahoning No. 04 MA 116, 2005–Ohio–1119, ¶ 14; *Luft v. Perry Cty. Lumber & Supply Co .,* 10th Dist. Franklin No. 02AP–559, 2003–Ohio–2305, ¶ 58; *Conrad v. Fifth Third Bank,* 6th Dist. Sandusky No. S–92–27, 1993 WL 235794 (June 30, 1993). It is ignorance of facts that provides relief. *Conrad.*

{¶ 24} Consequently, since it is knowledge of the facts and not the law that tolls the statute of limitations, the discovery rule is inapplicable in this case. Al–Mosawi knew of the assault when it occurred; thus, he knew of the injury and the facts surrounding it. This is not the situation where he could not have discovered the injury. Merely because he was not aware that under American law he could sue the Sheriff's Department does not toll the statute of limitations. As aforementioned, ignorance of the law is not a tolling event for purposes of the statute of limitations. Thus, akin to the above analysis in discussing whether Al–Mosawi is considered to be of unsound mind, the fact that he was not born in the United States and that he is not aware of American law does not toll the statute of limitations.

[3] {¶ 25} Lastly, Al–Mosawi contends that summary judgment was inappropriate because in the objections to the magistrate's decision he presented "new evidence" from his inmate assistant, Robert Hillman, which would allegedly foreclose summary judgment to Plummer. The "new evidence" was that Al–Mosawi was not made aware of his ability to file a complaint until early November 2009, when Hillman advised him of that right. Al–Mosawi cited to Civ.R. 60(B)(1), (2) and (3) as justification for denying Plummer's motion for summary judgment; he was attempting to use those reasons to toll the statute of limitations.

***5** {¶ 26} Civ.R. 60(B)(1), (2) and (3) allows for relief from a final order when there is either excusable neglect, newly discovered evidence, or fraud by the adverse party. At the outset, it must be explained that Civ.R. 60(B) has no application in this case. Civ.R. 60(B) is not an avenue that can be used as means to have a trial court deny a motion for summary judgment. Rather, it is used by a party seeking to vacate a final order. Civ.R. 60(B). For instance after a trial court grants summary judgment, which is a final order, a party may seek vacation of that judgment by filing a Civ.R. 60(B) motion and meeting all three requirements for vacation.

{¶ 27} That said, even if the reasoning in Civ.R. 60(B)(1), (2) or (3) could be used to render summary judgment inappropriate, those reasons are not applicable in this case. Al–Mosawi's justification for the application of excusable neglect was that he did not understand the laws and does not understand or speak English. Therefore, according to him, it is excusable neglect that he did not file his complaint within the two-year statute of limitations. As explained above, his purported lack of understanding English or the law does not toll the statute of limitations. All that is relevant is that he had

knowledge of his injury.

{¶ 28} Likewise, his purported inability to understand English or know the laws is not "newly discovered" evidence for purposes of Civ.R. 60(B). Newly discovered evidence is evidence which by due diligence could not have been discovered by Al–Mosawi. Civ.R. 60(B)(2). His inability to understand English and know the law was clearly known to Al–Mosawi. If Al–Mosawi is somehow contending that his lack of knowledge that he had the right to file a suit against Plummer qualifies as "newly discovered evidence," that argument still fails because the legal right to file a suit is not evidence, rather it is knowledge of the law. Furthermore, as explained above, the lack of knowledge of the law does not toll the statute of limitations. If Al–Mosawi meant that his inability to understand English and the laws was newly discovered evidence for the trial court, this argument also fails because "newly discovered evidence" must be newly discovered to the party, not the court. Regardless, the magistrate was clearly aware of these facts prior to its October 2011 decision. In October 2010, in Al–Mosawi's Motion for Summary Judgment, Al–Mosawi made it clear that part of his justification for filing the complaint beyond the statute of limitations was because he allegedly did not understand English or the laws. Thus, both the trial court and the magistrate were aware of this fact.

{¶ 29} Fraud also does not apply in this case. While it is true that fraud may act as tolling agent because the party injured may not know he is injured until a later date, here there is no evidence to even remotely suggest that fraud is what caused Al–Mosawi's injury or that he did not know of his injury. Rather the record is clear that Al–Mosawi knew of his injury and the facts surrounding his injury.

***6** {¶ 30} Thus, given the facts of this case, the reasons espoused in Civ.R. 60(B)(1), (2) and (3), even if they could be used, do not qualify as tolling events for purposes of the statute of limitations. The trial court did not commit error in failing to deny summary judgment on the basis of Civ.R. 60(B).

{¶ 31} Consequently, for all the above reasons the trial court did not err when it granted summary judgment in Plummer's favor. The statute of limitations had expired when the complaint was filed. The sole assignment of error lacks merit.

{¶ 32} The trial court's decision is hereby affirmed.

DONOVAN, J. and HALL, J., concur.
(Hon. JOSEPH J. VUKOVICH, Seventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Ohio App. 2 Dist.,2012.
Al-Mosawi v. Plummer
Slip Copy, 2012 WL 6674490 (Ohio App. 2 Dist.), 2012 -Ohio- 6034

END OF DOCUMENT

Exhibit F

Not Reported in N.E.2d, 1997 WL 117218 (Ohio App. 5 Dist.)
(Cite as: 1997 WL 117218 (Ohio App. 5 Dist.))

Court of Appeals of Ohio, Fifth District, Stark County.
Doris COLBY Plaintiff-Appellants
v.
TERMINIX INTERNATIONAL CO., L.P., et al
Defendant-Appellees

No. 96-CA-0241.
Feb. 10, 1997.

Civil appeal from the Stark County Court of Common Pleas, Case No.1995CV00354
For Plaintiff-Appellants ELIZABETH A. BURICK JOHN V. BOGGINS 1428 Market Ave. N. Canton, OH 44714

For Defendant-Appellees DOUG BOND 115 DeWalt Ave. N.W. Suite 205 Canton, OH MITCHELL S. PINSLYThe Curtis Center, 4th FloorIndependence SquareW. Philadelphia, PA 19106-3304 KAREN SOEHNLEN MCQUEEN 4775 Munson St. N.W. Canton, OH 44735-6963

Before GWIN, P.J. and HOFFMAN and FARMER, JJ.

OPINION

GWIN, P.J.

***1** Plaintiffs Doris and Thomas Colby appeal a summary judgment of the Court of Common Pleas of Stark County, Ohio, entered in favor of defendants Terminix International Co., State Termite and Pest Control Company, and Quest Recovery Services, finding plaintiffs' claims were not timely filed under R.C.2305.10, the applicable statute of limitations. Appellants assign a single error to the trial court:

ASSIGNMENT OF ERROR

THERE ARE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE CONCERNING WHETHER OR NOT THE APPELLANTS' CAUSE OF ACTION WAS TIMELY FILED WITHIN THE TWO YEAR STATUTE OF LIMITATIONS BY PROPERLY APPLYING THE DISCOVERY RULE TO THE FACTS OF THIS CASE.

Appellants' statement pursuant to Loc.App. R. 4(D) states summary judgment was inappropriate because there is a genuine dispute as to several material facts, namely, whether or not appellants filed their cause of action within the two year statute of limitations as modified by the discovery rule; and when appellant discovered or should have discovered the proximate cause of her injury so as to start the statute of limitations running.

Appellee Quest Recovery Services assigns a single error on cross-appeal:

ASSIGNMENT OF ERROR

THE COURT ERRED BY FAILING TO GRANT SUMMARY JUDGMENT TO QUEST ON THE INDEPENDENT GROUND THAT PLAINTIFF COLBY FAILED TO PRESENT EVIDENCE SUFFICIENT TO SUPPORT A JURY VERDICT AS TO ALL ELEMENTS OF HER INTENTIONAL TORT CLAIM.

Civ. R. 56(C) states in pertinent part:

Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stip-

> ulation may be considered except as states in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in favor.

A trial court should not enter a summary judgment if it appears a material fact is in genuine dispute, nor if, construing the allegations most favorably towards the non-movant, reasonable minds could draw different conclusions from undisputed facts, *Hounshell v. American States Insurance Company* (1981), 67 Ohio St.2d 427 at 433. A trial court may not resolve ambiguities in the evidence presented, *Inland Refuse Transfer Company v. Browning -Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 121. A reviewing court reviews a summary judgment by the same standard as the trial court, *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

Appellants' complaint alleged Doris Colby sustained personal injury as a direct and proximate result of exposure to pesticides applied by appellees Terminix and State between 1987 and 1993. Appellants brought causes of action based upon negligence, strict liability, and intentional tort against Terminix and State, and a cause of action based upon intentional tort against Quest, Doris Colby's employer at the time. Appellants filed their complaint on February 28, 1995.

***2** Doris Colby deposed she had personally observed Terminix and State personnel over a number of years applying pesticides at her workplace when she was employed by Quest. She began experiencing episodes of laryngitis, and consulted with Dr. John Given, an allergist. In 1992, Dr. Given informed Doris Colby pesticides could be causing her symptoms. Doris Colby filed an incident report notifying her employer, Quest, that on August 19, 1992, Terminix sprayed the lunchroom while employees were present and eating. Within approximately 15 minutes, Colby lost her voice, and her doctor informed her pesticides caused her laryngitis. On the instructions of Dr. Given, Colby began to keep a diary noting, among other things, the days on which the Quest facility was treated with pesticides. In response to Colby's concerns, Quest agreed to permit Colby to take time off work whenever the pesticides were to be applied.

In January of 1993, Dr. Given referred appellant Doris Colby to Dr. Donald Nelson, who began various allergy tests to clarify what might be causing appellant's symptoms. Dr. Given had informed appellant he was extremely suspicious she was sensitive to an insecticide used at the place of her employment on a monthly basis. On January 21, 1993, Dr. Nelson made a provisional diagnosis of chemical sensitivity as a result of the spraying of pesticides at appellant's place of employment. On March 8, 1993, Dr. Nelson gave as a final diagnosis appellant's symptoms were caused by chemical sensitivity as a result of exposure to pesticides in her workplace. In May of 1994, Dr. Nelson completed a Workers' Compensation form, on which he reported he first advised Colby of his diagnosis on January 21, 1993.

R.C. 2305.10 provides an injured party must bring suit within two years of the injury. The Ohio Supreme Court has held statutes of limitations must allow for reasonable opportunity to pursue a remedy in order to pass constitutional muster. In order to guard against the statute of limitations barring recovery for an injury when the cause of the injury is unknown, Ohio courts have developed the "discovery rule." The discovery rule provides the cause of action arises on the date on which the injured person is informed by competent medical authority that he has been injured, or upon the date on which the injured party should have become aware that he had been injured, whichever date occurred first, see *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84.

Appellant urges she could not reasonably have

known the extent or the cause of her injuries prior Dr. Nelson's March 8, 1993 diagnosis. Appellants' expert witness submitted an affidavit offering the professional opinion that injuries due to chemical exposure cannot be properly diagnosed without extensive testing, and must be analyzed by a trained physician. The expert opined a lay person could not make a causal connection between chemical exposure and the resulting injury. Appellant asserts although she was aware at least in 1992 that there could be some connection between the spraying and her cough and laryngitis, she was not aware that these symptoms could or would develop into a permanent and disabling condition. In addition, although Dr. Given was suspicious of the chemicals being used in her workplace, no expert medical opinion, based upon a reasonable degree of medical certainty, was available until Dr. Nelson gave his final opinion on March 8, 1993.

***3** This court recently reviewed the case of *Telakowicz v. John Bunn Company* (July 23, 1993), Ashland Appellate # CA-0124, unreported. In *Telakowicz,* the plaintiff claimed he suffered injuries as a result of the failure of an oxygen concentrator supplied by defendant the John Bunn Company. The plaintiff had a history of respiratory difficulties which led his doctor to prescribe the supplemental oxygen. He began using the Bunn Oxygen concentrator in 1983 and began to experience more respiratory problems in 1986. In response he increased his use of the concentrator progressively until he was using it 24 hours per day. Eventually, the plaintiff was admitted to the hospital for acute respiratory failure and other complications. He then began a cycle of hospitalizations continuing through 1987. When he was not hospitalized, he used the Bunn oxygen concentrator. On June 10, 1987, the plaintiff asked his doctor about the oxygen concentrator, and the doctor confirmed in writing the concentrator was malfunctioning. On appeal, this court reviewed the defendant's claim the statute of limitations had run before the plaintiff filed his complaint.

This court found the date on which the statute of limitations began to run was not the date when the plaintiff began to suspect the oxygen concentrator was malfunctioning, but rather on June 10, 1987, the date his doctor informed him the concentrator was malfunctioning and was causing his injury. This court declined to hold the plaintiff's suspicions, coupled with his consultation of an attorney, constituted sufficient discovery of the injury. The dissent in *Telakowicz* notes "several cognizable events which should have alerted the plaintiff to the need to investigate." We believe, however, alerting a person's suspicions of the need to investigate does not rise to the same level as receiving definite information by competent medical authority. Suspicion is not sufficient to trigger the discovery rule.

We find although the facts are undisputed, reasonable minds could reach different conclusions regarding the inferences permissible from those facts. For this reason, we conclude summary judgment was inappropriate.

The assignment of error is sustained.

Turning to cross-appellant Quest's assignment of error, Quest suggests the trial court erred in not addressing its motion for summary judgment made on the independent ground appellants failed to present sufficient evidence to support the elements of their claim of intentional tort.

Quest urges the record does not contain any evidence to support appellant's claims Quest had committed an intentional tort against appellant Doris Colby. Appellants respond it is inappropriate for us to address this assignment of error because the trial court did not do so. We note, however, this court stands in the shoes of the trial court in reviewing summary judgments, see *Smiddy, supra.* This court can address the motion for summary judgment even though the trial court apparently concluded it was moot in light of its ruling on the issue of statute of limitations.

***4** Section 35, Article II of the Ohio Constitu-

tion and R.C.4123.74 provide an employer is immune from suit by its employees for occupational injuries except for injuries resulting from intentional torts, see *Jones v. VIP Development Company* (1984), 15 Ohio St.3d 90.

In *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, the Supreme Court:

> 1. Within the purview of Section 8(A) of the Restatement of the law 2d, Torts, and Sections 8 of Prosser & Keeton on Torts (5 Ed.1984), in order to establish "intent" for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subject by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task. *(Van Fossen v. Babcock & Wilcox Co.* [1988], 36 Ohio St.3d 100, 522 N.E.2d 489, paragraph five of the syllabus, modified as set forth above and explained.)
>
> 2. To establish an intentional tort of an employer, proof beyond that required to prove negligence and beyond that to prove recklessness must be established. Where the employer acts despite his knowledge of some risk, his conduct may be negligence. As the probability increases that particular consequences may flow, then the employer's conduct may be characterized as recklessness. As the probability that the consequences will follow further increases, and the employer knows that injuries to employees are certain or substantially certain to result from the process, procedure or condition and he still proceeds, he is treated by the law as if he had in fact desired to produce the result. However, the mere knowledge and appreciation of a risk-something short of substantial certainty-is not intent. *(Van Fossen v. Babcock & Wilcox Co.* [1988] 36 Ohio St.3d 100, 522 N.E.2d 489, paragraph six of the syllabus, modified as set forth above and explained.)

Syllabus by the court, paragraphs 1 and 2

In *Wing v. Anchor Media Ltd. of Texas* (1991), 59 Ohio St.3d 108, the Supreme Court, citing *Celotex v. Catrette* (1986), 77 U.S. 317, held a summary judgment motion forces the non-moving party to come forward with evidence on all issues for which that party bears the burden of production at trial.

We have reviewed the record, and we find appellants have not come forward with evidence on the elements of an intentional tort by Quest. Further, as Quest points out, appellants would have to show Quest knew that if Doris Colby was subjected to exposure to these chemicals then harm to her would be a substantial certainty, even though appellants assert they did not know and could not know Doris Colby's exposure would cause serious harm until so informed by Dr. Nelson.

***5** We find reasonable minds cannot differ on the issue of whether appellee Quest Recovery Services is liable for an intentional tort against appellants. For this reason, we find the trial court should have entered summary judgment on this issue.

The cross assignment of error is sustained.

For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is reversed, and pursuant to App. R. 12, we enter final judgment in favor of appellee Quest Recovery Services, and remand the portion of the action pertaining to the other appellees to the trial court for further proceedings in accord with law and consistent with this opinion.

FARMER, J., concurs in part and dissents in part.

FARMER, J., dissenting in part

I respectfully dissent from the majority's opin-

ion that appellant could not have reasonably known the extent or the cause of her injuries prior to Dr. Nelson's examination of March 8, 1993. Appellant's own actions contradict the majority's theory. Appellant filed a worker's compensation claim in which Dr. Nelson reported he advised her of the diagnosis on January 21, 1993. Further, appellant filed an incident report with appellee, Quest informing them the August 19, 1992 Terminix spraying caused her to experience symptoms. As a result, appellant arranged to be absent from her employment during and after any spraying from said date.

It is my considered opinion that on August 19, 1992, appellant became aware of her injuries and the proximate cause of those injuries. Therefore, I concur with the trial court's reasoning the statute of limitations had passed prior to the filing of the complaint.

I do concur there is no evidence appellee Quest required appellant to continue performing dangerous tasks. As a matter of law, appellee Quest is not liable in intentional tort because appellant failed to affirmatively demonstrate the three prongs of *Fyffe.*

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Stark County, Ohio, is reversed, and, the portion of the action pertaining defendants Terminix International Co. And State Termite and Pest Control Company is remanded to the court for further proceedings in accord with law and consistent with this opinion.

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Stark County, Ohio is reserved, and pursuant to App. R. 12 we hereby enter final judgment on behalf of appellee Quest Recovery Services.

Ohio App. 5 Dist.,1997.
Colby v. Terminix Intern. Co.
Not Reported in N.E.2d, 1997 WL 117218 (Ohio App. 5 Dist.)

END OF DOCUMENT

Exhibit G

Not Reported in F.Supp.2d, 2013 WL 1284185 (N.D.Ohio)
(Cite as: 2013 WL 1284185 (N.D.Ohio))

C

Only the Westlaw citation is currently available.

United States District Court,
N.D. Ohio,
Western Division.
Pamela WILLIAMS, et al., Plaintiffs
v.
BOSTON SCIENTIFIC CORPORATION, Defendant.

No. 3:12CV1080.
March 27, 2013.

John L. Huffman, Mickel & Huffman, Toledo, OH, Mark A. Dicello, Robert J. Dicello, Law Office of Robert J. Dicello, Mentor, OH, Michael J. Stewart, John T. Murray, Murray & Murray, Sandusky, OH, for Plaintiffs.

Craig A. Marvinney, Leslie G. Wolfe, Walter & Haverfield, Cleveland, OH, for Defendant.

ORDER

JAMES G. CARR, Senior District Judge.

***1** This is a product liability case in which defendant, Boston Scientific Corporation (BSC), has moved to dismiss plaintiffs', Pamela and Robert Williams [FN1], first amended complaint under Fed.R.Civ.P. 12(b)(6). For the reasons that follow, I grant the motion in part and deny it in part.

FN1. Plaintiffs are husband and wife.

BSC manufactured and sold two medical devices later implanted in Pamela on January 29, 1998, to treat urinary incontinence. The devices were "ProteGen," made of woven polyester fabric coated with bovine collagen, and "Vesica," which included pins, suture material, and other components used in conjunction with the ProteGen. By the time of Pamela's surgery, BSC marketed both items together in a "Vesica Kit," also known as a vaginal sling.

In 2008, Pamela had episodes of occasional stress urinary incontinence. She so informed her doctor, who offered no medical treatment at that time. Around June 2011, she began having vaginal bleeding, increased incontinence, and, in July, began experiencing lower-left abdominal pain. She began treating with the doctors who had conducted her surgery ten years earlier.

On December 13, 2012, a doctor at the Cleveland Clinic verified Pamela had an exposed vaginal sling that required resection. The following February, that doctor concluded Pamela had two centimeters of exposed anterior vaginal mesh from the Vesica vaginal sling. She underwent surgery to remove the vaginal-sling-eroded tissue on February 9, 2012. Pamela's doctor found that the mesh was extruding and non-adherent to tissue.

Pamela contends that the sling, due to its collagen coating, was "erosive," and caused the physiological injuries and resulting surgery.

Aside from these details about Pamela's medical history and experience with BSC's products, the complaint alleges B SC was on notice from physicians working on development of the vaginal sling that use of synthetic materials was problematic. They had concerns about the erosive qualities of synthetics. BSC continued its development of the sling despite the notice.

Without conducting animal studies, and, in view of the fact that the FDA had already approved the Vesica bone anchoring system, BSC filed a 510K application with the FDA in August 1996. BSC anticipated marketing the product in December 1996.

BSC encountered manufacturing delays. To counter the financial effect of those delays in getting the product to market, BSC decided to forgo its original plans to provide the product to a select group of doctors so they could monitor its perform-

ance before its widespread distribution.

After the initial launch of the device into the market in early 1997, BSC created an "Incontinence Team" to meet monthly to review its incontinence projects. During a November 18, 1997, meeting participants voiced concerns about the bioincompatibility of the ProteGen, as evidenced by a large number of reported complaints and complications. Among these was ProteGen's failure to promote the type of "tissue in-growth" that B SC had represented and described to urologists in its sales and marketing materials.

***2** By the end of 1997, before Pamela had her surgery, the FDA had received fifty-eight medical device reports regarding ProteGen. In addition, BSC began undertaking studies to develop a new sling. By March 1998, BSC had decided to replace ProteGen with a successor product, the ProteGen II. It decided to continue selling the original product until it developed the successor sling.

Around January 20, 1999, BSC received a consultant's report. The report informed B SC that the complication rate for the ProteGen, as reported in medical literature, was higher than other implant materials. The report stated that woven polyester fabric coated with bovine collagen could not be ruled out as a cause for the complications.

About a year later, on January 22, 1999, BSC announced a voluntary recall of 25,000 ProteGen devices.

On the basis of these factual contentions, Pamela asserts, in generally conclusory terms, several causes of action: negligence; defective manufacture; defective design; marketing defect; breach of warranty; failure to warn; strict product liability; fraud; and violation of the Ohio Consumer Sales Practices Act. Her husband, Robert, seeks recovery for loss of consortium. Plaintiffs request an award of punitive damage and attorneys' fees.

In its motion to dismiss, BSC asserts two overarching challenges and, as well, contends that none of the individual counts successfully state claims against it. I first consider the overarching challenges based on the two statute of limitations and the *Igbal/Twombly* doctrine; I then address the contentions regarding each separate count in the complaint.

Discussion

1. Contentions Applicable to All Claims

A. Statute of Limitations

The parties agree that Ohio's two-year statute of limitations for personal injuries, O.R.C. § 2305.10, applies. They disagree, however, about when the limitations period began to run.

According to BSC, Pamela knew or should have known of her injury in 2008. BSC cites, as the limitations-triggering event, that Pamela then experienced a resumption of occasional stress urinary incontinence, and she knew or should have known the vaginal sling implanted ten years earlier (and that had, apparently, functioned since then without any indication of problems) was causing the incontinence.[FN2] Though Pamela told her doctor she had occasional stress incontinence, the physician did nothing in response. This, BSC claims, sufficed to alert Pamela that its device, if defective, had caused the return of that condition. Pamela argues that the statute was not triggered until her physician told her, in February, 2012, that the defective Vesica kit had likely caused her symptoms.[FN3]

FN2. BSC contends in its brief in support of its motion for summary judgment that, "[i]n plaintiff's own words she became aware in ***2008*** that the injuries of which she now complains were caused by Boston Scientific." (Doc. 23, at 4). That statement is a misleading misreading of plaintiffs' complaint, which actually reads: "In approximately 2008, Plaintiff told her family physician she had occasional stress urinary incontinence." (Doc. 18–1, ¶ 46).

FN3. It is at least arguable that Pamela

> knew or should have known some months earlier, in either June 2011, when she began having vaginal bleeding, increased incontinence, or, in any event, some weeks later, in July, when she also began experiencing lower left abdominal pain. Even if so, that would not matter, as she still filed her complaint well within two years after that time.

"The discovery rule provides that a cause of action does not arise until the plaintiff knows, or by the exercise of reasonable diligence should know, that he or she has been injured by the conduct of the defendant." *Flagstar Bank, F.S.B. v. Airline Union's Mortg. Co.,* 128 Ohio St.3d 529, 947 N.E.2d 672, (2011) (citing *Collins v. Sotka,* 81 Ohio St.3d 506, 507, 692 N.E.2d 581 (1998)). "The rule entails a two pronged test—*i.e.,* actual knowledge not just that one has been injured but also that the injury was caused by the conduct of the defendant." *Id.* (citing *O'Stricker v. Jim Walter Corp.,* 4 Ohio St.3d 84, 90, 447 N.E.2d 727 (1983)).

***3** That one may have some awareness, *Burgess v. Eli Lilly & Co.,* 66 Ohio St.3d 59, 609 N.E.2d 140, (1993), or even suspect, *Grimme v. Twin Valley Cmty. Local Sch. Dist. Bd. of Educ.,* 173 Ohio App.3d 460, 878 N.E.2d 1096, (2007), a connection between injury and possible cause does not trigger the statute.

Nothing in the allegations as pled suggests, or provides the basis for a fair assumption that, Pamela knew enough in 2008 to connect her *occasional stress incontinence* with the injuries that the device, according to her complaint, ultimately caused. Moreover, her doctor was, apparently, so unconcerned that he did nothing in response to her complaints. Finally—a fact that BSC ignores entirely in its discussion of its statute of limitations claim—the multiple and severe symptoms that ultimately led to removal of the device did not manifest themselves until July, 2011.[FN4]

> FN4. BSC suggests, in effect, that plaintiffs should have filed a complaint within the next two years, when Pamela's sole allegation would have been that BSC's device caused occasional stress incontinence (about which her doctor did nothing). If that were all plaintiffs alleged—because that was all Pamela knew—would BSC accept that such contention met any standard of notice pleading, much less *Twombley/Iqbal* ?

I find no merit whatsoever in BSC's claim that the statute of limitations began to run in 2008 when she had occasional (and apparently ultimately transient) stress urinary incontinence.[FN5]

> FN5. BSC's reply raises, for the first time, the contention that the ten-year statute of repose, O.R.C. § 2305.10(C)(1) bars plaintiffs' suit. Arguments not raised in the opening brief are waived. *See, e.g., McPherson v. Kelsey,* 125 F.3d 989, 995–996 (6th Cir.1997). As stated in *Inland Waters Pollution Controls, Inc. v. Marra/Majestic Joint Venture,* 2009 WL 700773, *5 (N.D.Ohio) (citing *Novosteel SA v. U.S. Bethlehem Steel Corp.,* 284 F.3d 1261, 1274 (Fed.Cir.2002)):
>
> > Raising the issue for the first time in a reply brief does not suffice; reply briefs reply to arguments made in the response brief—they do not provide the moving party with a new opportunity to present yet another issue for the court's consideration. Further the non-moving party ordinarily has no right to respond to the reply brief, at least until oral argument. As a matter of litigation fairness and procedure, then, we must treat [such issues] as waived.

B. *Twombly/Iqbal*

The second poisoned arrow in BSC's quiver is the contention that plaintiffs failed to meet the heightened pleading standard of *Bell Atlantic Corp.*

v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). I disagree.

As BSC correctly points out, to survive a motion to dismiss for failure to state a claim under *Twombly,* "[f]actual allegations must be enough to raise a right to relief above the speculative level," 550 U.S. at 555, and set forth "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. To meet this standard, the complaint must contain "more than labels or conclusions" or "a formulaic recitation of the elements of a cause of action." *Id.* at 555. Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal,* 556 U.S. at 678.

This complaint meets the standard. It alleges more than sufficient detail to inform BSC of the nature of plaintiffs' claims and their factual underpinnings. Among these are that Pamela had one of BSC's devices surgically implanted at a time when BSC knew, or, at least, had a reasonable basis for knowing, that the device might cause an unusual rate of complications. Indeed, the complaint alleges that, even before those problems manifested themselves, BSC's scientists expressed concern about the possible safety of a component in one of the two devices in the vaginal sling kit. The complaint also alleges insufficient testing and failure to conduct a limited release to monitor the performance of the device before undertaking a nationwide marketing program. As a result, according to the complaint, the company sent, without adequate warning, a dangerous device into the marketplace.

All these failings, the complaint asserts, caused serious injuries to Pamela.

In essence, B SC contends that, to survive a *Twombly /Iqbal* challenge, plaintiffs must allege in greater detail what went wrong with the sling, and why it did so, after it was placed in her body. That sort of detail is not necessary at this stage. The complaint alleged two centimeters of exposed anterior vaginal mesh from the Vesica vaginal sling required Pamela to undergo surgery to have it removed. During surgery, Pamela's doctor found that the mesh was extruding and non-adherent to tissue. Pamela's contention that this relatively free-moving foreign object, present in the same area as her pain, caused her abdominal symptoms. Plaintiff need not further state exactly how or why the sling caused her internal injuries to state a claim plausible on its face.

***4** Contrary to B SC's contention, I find the Seventh Circuit's observation in *Bausch v. Stryker Corp.,* 630 F.3d 546, 558 (7th Cir.2010),[FN6] apt and applicable: "district courts must keep in mind that much of the product-specific information about manufacturing needed to investigate such a claim fully is kept confidential by federal law. Formal discovery is necessary before a plaintiff can be expected to provide a detailed statement of the specific bases for her claim."

> FN6. A Judge of this District quoted *Bausch* with approval in a case involving a different medical device produced by the defendant. *Cameron v. Boston Scientific Corp.,* 2012 WL 1592535, *5, *Magistrate Judge's Report and Recommendation adopted,* 2012 WL 1592535 (N.D.Ohio).

BSC demands, however, that a plaintiff, to beat back a motion to dismiss in a case such as this, must give more detail than Pamela did here about what went wrong and how it did so. To adopt this overly cribbed and unrealistic standard would, in many cases, effectively grant medical device manufacturers *de facto* immunity. Deploying the portcullis of *Twombley/Igbal* in this ruthless manner would bar many plaintiffs with potentially successful claims from any fair chance of recovery.

I find no merit in BSC's contention that the factual allegations in the complaint fail to meet the *Twombley/Igbal* requirements.

I turn now to BSC's challenges to the specific causes of action in the complaint. I agree that I should dismiss some, but not all, of them.

2. Challenges to Individual Claims

A. Negligence

BSC claims that Pamela has failed to state a claim for negligence. I disagree.

As stated in *Little v. Purdue Pharma, L.P.*, 227 F.Supp.2d 838, 848–849 (S.D.Ohio 2002) (citing *Freas v. Prater Constr. Corp., Inc.*, 60 Ohio St.3d 6, 573 N.E.2d 27, 30 (Ohio 1991)), "to recover in an action for products liability based upon negligence, a plaintiff must show that the defendant owed him a duty, that the duty was breached and that the injury proximately resulted from the breach." The allegations in the complaint satisfy these requirements. Taken as true, those allegations show that BSC manufactured and distributed a device with erosive qualities that, in time, caused the device to fail, with injury proximately resulting. She also alleges foreseeability, in that early on BSC was on notice that use of artificial mesh might create problems.

BSC argues that Pamela did not specifically allege a standard of care or its breach. Any fair reading of this complaint indicates, even if only implicitly (but also, indisputably [FN7]) that BSC had a duty to manufacture a device that, when implanted in the human body, would not cause injury to those who received the device.

> FN7. I decline to read BSC's motion as suggesting it has no duty to produce devices without regard to their safety.

Pamela has stated a cause of action for negligence.

B. The Ohio Product Liability Act, O.R.C. § 2307.73(A)(1)

Plaintiffs claim the device violated the Ohio Product Liability Act (OPLA), O.R.C. § 2307.73(A)(1), due to defects in its design and marketing (*i.e.*, failure to warn).

To prevail on such claim, an injured plaintiff, in addition to showing proximate cause, must show either that the product was defective "in manufacture or construction ... design or formulation ... [or] due to inadequate warning or instruction, ... [or] because it did not conform to a representation made by its manufacturer. O.R.C. § 2307.73(A)(1).

i. Design and Manufacturing Defects

***5** Here, based on the facts set forth above, I conclude that Pamela has stated causes of action for defective design and manufacture. She pled, in more than conclusory terms, and has shown, according to her allegations, that B SC was on notice before producing their product of its risks, but did not alter its design.

The complaint also adequately alleges that the device, as manufactured, incorporated one or more components that, either singly or in combination, led to Pamela's injuries. This suffices, in light of the facts alleged, to state a cause or causes of action for design and manufacturing defects.[FN8]

> FN8. Whether the defect leading to the injuries resulted precisely from either a design or manufacturing defect, or both (or neither) can best be ascertained following discovery.

ii. Failure to Warn; Defective Marketing

Though plead as separate counts, Pamela' claims of failure to warn and defective marketing are based in the same essential contention: namely, BSC failed to provide an adequate warning as the risks of its use.

The Sixth Circuit stated the elements of a claim for breach of the duty to warn in a products liability case:

> The claim has three elements, each of which must be satisfied: (1) a duty to warn against reasonably foreseeable risks; (2) breach of this duty; and (3) an injury that is proximately caused by the

> breach. Under Ohio law, the manufacturer of a prescription drug discharges its duty to warn about risks regarding prescription drugs if the manufacturer adequately warns the patient's doctor of those risks. When a plaintiff alleges that the warning given to a prescribing physician is inadequate, the plaintiff must prove his claim through expert medical testimony.

Graham v. American Cyanamid Co., 350 F.3d 496, 514 (6th Cir.2003).

BSC contends that Pamela has not defined the warning that should have been given. However, she does not have a duty at *this* stage to be *that* precise. Instead, she must simply plead the three elements which *Graham* recites, and do so in accordance with *Twombly/Igbal.*

Plaintiffs have done so here. The complaint alleges prior knowledge of the defect which, it also alleges, caused serious injury. There was, though, no warning. To the extent that some detail is necessary about the missing content, plaintiffs amply provide that detail:

> Specifically, Defendant did not provide sufficient or adequate warnings regarding, among other subjects: the device's propensity to erode, the rate and manner of erosion, the risk of chronic infections resulting from implantation, the risk of vaginal scarring, the risk of recurrent severe pelvic pain and other pain resulting from the implantation, the need for corrective or revisionary surgery to adjust or repair the device, and the overall severity of complications that could arise as a result of implantation of the medical devices.
>
> (Doc. 18–1 ¶ 84).

iii. Breach of Express and Implied Warranties

I agree with B SC, however, that Pamela has failed adequately to allege claims under OPLA (or otherwise) for breach of express or implied warranty.

(a). Express Warranty

***6** With regard to a claim of breach of express warranty, plaintiffs must show: (1) the manufacturer made a representation as to a material fact concerning the quality of the manufacturer's product; (2) the product did not conform to that representation; (3) the plaintiff justifiably relied on that representation; and (4) the plaintiff's reliance on the representation was the direct and proximate cause of the plaintiff's injuries. *See, e.g., Cervelli v. Thompson/Center Arms,* 183 F.Supp.2d 1032, 1045 (S.D.Ohio 2002).

Here, the complaint fails to state facts showing, to any plausible extent, that BSC provided an express warranty to Pamela or anyone else, much less one of which they were aware and on which they relied. Here, at the very least, Pamela's claim fails under *Twombly/Iqbal.*

(b). Implied Warranty

The same is true, as BSC argues, with regard to Pamela's claim of breach of implied warranty. Pamela has not plausibly alleged reliance on any such warranty. Though there appears to be no Ohio case directly on point, *i.e.,* where an implied warranty relating to a medical device was at issue, I am satisfied that reliance is an element of her claim. *Cf. Kinstle v. J & M Manufacturing Co.,* 1977 WL 199565, 3 (Ohio App.) ("reliance by the buyer upon the seller's representations is one of the elements that give rise to liability for either express or implied warranty."); *Cervelli,* 183 F.Supp.2d at 1045.

C. Fraud

Pamelas' fraud claim fails for the same reason as the warranty claims: lack of a plausible claim of reliance on any purported misrepresentations. *See, e.g., Burr v. Board of County Commis,* 23 Ohio St.3d 69, 73, 491 N.E.2d 1101 (1986).

In addition, the complaint falls far short of meeting the requirements of Fed.R.Civ.P. 9(b). That Rule requires that a complaint state with "particularity the circumstances constituting fraud or mistake." In our Circuit this means alleging "the time, place, and content of the alleged misrepres-

entation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 563 (6th Cir.2003).

None of that is stated here, and BSC is entitled to dismissal of this claim.

D. Ohio Consumer Sales Practices Act O.R.C. § 1345.01(D)

Pamela claims BSC violated the Ohio Consumer Sales Practices Act (OCSPA), O.R.C. § 1345.01(D). The elements that a plaintiff must prove are "a material misrepresentation, deceptive act or omission" that impacted the decision to obtain the item at issue. "Whether it be termed an issue of reliance or an issue of proximate cause, an appropriate rule is that where the defendant is alleged to have made material representations or misstatements, there must be a cause and effect relationship between the defendant's acts and the plaintiff's injuries." *Reeves v. PharmaJet, Inc.*, 2012 WL 380186, *5 (N.D.Ohio) (quoting *Lilly v. Hewlett–Packard Co.*, 2006 WL 1064063, *5 (S.D.Ohio 2006)). Pamela has not plausibly pled that she relied on any of the alleged misstatements. Moreover, the device was not a "consumer good." *Reeves v. PharmaJet, Inc.*, 2012 WL 380186, *5 n. 2 (N.D.Ohio) (prescription medical device is not a consumer good under the OCSPA). The hospital, not Pamela, was, under the OCSPA, the "consumer" participating in a "consumer transaction." The statute provides that a "consumer transaction" is "a sale ... or other transfer of an item of goods ... to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things." O.R.C. § 1345.01(A). A "consumer" under the OCSPA is a person who engages in a consumer transaction with a supplier. Thus, the hospital was the consumer. Pamela, accordingly, did not engage in a consumer transaction within the OCSPA's scope.

E. Loss of Consortium

*7 Defendant bases its challenge to the husband's claim of loss of consortium on its claims that the complaint fails *in toto*. That not being so, he can proceed on that claim.

3. Punitive Damages/Attorneys' Fees and Costs

Determining now whether I should charge the jury as to punitive damages and consider an award of costs in the event it were to return such award would be premature. For now, I will overrule the defendant's attempt to exclude those options, without prejudice to renew.[FN9]

FN9. It is my general, but not immutable, practice to withhold judgment on whether to allow the jury to consider an award of punitive damages until the final charge. Only then, most instances, am I in a position to determine whether the evidence warrants such charge.

Conclusion

For the foregoing reasons, it is hereby

ORDERED THAT defendant's motion to dismiss (Doc. 22), be, and hereby is granted with regard to plaintiff's claims for breach of express and implied warranty, fraud, and violation of the Ohio Consumer Sales Practices Act; and otherwise denied (without prejudice as to the issues of punitive damages and attorneys' fees and costs).

So ordered.

N.D.Ohio,2013.
Williams v. Boston Scientific Corp.
Not Reported in F.Supp.2d, 2013 WL 1284185 (N.D.Ohio)

END OF DOCUMENT

Exhibit H

Copies to: Jason E. Luckasevic, Esq; Arthur W. Hankin, Esq.; Robert E Dapper, Jr. Esq.; File

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA
CIVIL DIVISION

MATTHEW ONYSHKO and JESSICA ONYSHKO, his wife,

Plaintiffs,

vs.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

Defendant.

No. 2014-3620

ENTRY OF OPINION, ORDER, DECREE, ADJUDICATION OR JUDGMENT FILED 12-3-14

MAILED 12-4-14

J. Luckasevic

ORDER

AND NOW, this 3rd day of DECEMBER, 2014, it is hereby ORDERED, ADJUDGED, and DECREED that the Defendants' preliminary objections are OVERRULED.

This action arises out of plaintiff Matthew Onyshko's recently diagnosed brain and spinal cord injuries he attributes to repeated blows to his head suffered during his five-year collegiate football career at California University of Pennsylvania. In June of 2014, Onyshko and his wife filed a two-count complaint alleging negligence and loss of consortium against the National Collegiate Athletic Association (NCAA) based on its failure to adequately supervise, regulate, and minimize the risk of long-term brain injury resulting from repeated head impacts. In response, the NCAA filed the instant preliminary objections, arguing that plaintiffs' complaint should be dismissed for legal insufficiency under Pennsylvania Rule of Civil Procedure 1028(a)(4) because plaintiffs have not alleged any legally recognizable duty owed to them by the NCAA.

When ruling on preliminary objections in the form of a demurrer, a court must accept as true all well-pleaded, material and relevant facts, as well as every inference reasonably deducible from

those facts. *Willet v. Pennsylvania Med. Catastrophe Loss Fund*, 702 A.2d 850, 853 (Pa. 1997) (citations omitted). Preliminary objections which result in a denial of the pleader's claim or the dismissal of his suit should only be sustained in cases that clearly and without a doubt fail to state a claim for which relief may be granted under any theory of law. *Id.* Where doubt exists as to whether a demurrer should be sustained, the doubt should be resolved in favor of overruling it. *Id. See also Chem v. Horn*, 725 A.2d 226, 228 (Pa. Cmwlth. 1999) (stating that "[t]he question presented by a demurrer is whether, in the facts averred, the law says with certainty that no recovery is possible.").

Plaintiffs argue that the NCAA owed them a legally recognizable duty based on the NCAA's (1) failure in its undertaking to provide adequate educational and safety standards for student athletes relating to long term consequences of head impacts, (2) failure in its undertaking to assist member institutions in protecting student athletes, (3) assumption of a duty to student athletes by undertaking to act as a leader in providing "healthy and safe" environments, and (4) assumption of the duty owed to student athletes by member institutions to formulate safety guidelines. Plaintiff's Brief in Opposition to Preliminary Objections, at 5-12. Conversely, the NCAA argues that there "simply is no duty under Pennsylvania law to protect another from inherent risks in an activity," Defendant's Reply Memorandum, at 1, relying on *Craig v. Amateur Softball Ass'n of Am.*, 951 A.2d 372 (Pa. Super. 2008) - a case invoking the "no-duty rule" to affirm summary judgment in favor of the Amateur Softball Association of America (ASA) on a negligence claim brought by a player for injuries suffered during a game organized under ASA rules.

Craig premised his claim primarily on the theory that "ASA had a duty to recommend and/or mandate [he] wear a helmet," *Craig*, 951 A.2d at 374, or in other words - the ASA had a duty to implement proper safety standards for its games but failed to do so. The Onyshkos do not claim that the NCAA had a general duty to mandate safety standards; they claim instead that once the NCAA voluntarily undertook to guarantee player safety, it had a duty to protect those who relied on this

guarantee. Put another way, Onyshko does not claim that the NCAA permitted him to play without a helmet; he claims the NCAA falsely guaranteed that his helmet would protect him – and it did not.

The Onyshkos also advance a theory of liability not addressed at all by the *Craig* court – that the NCAA assumed the duty owed to student athletes by member institutions to formulate safety guidelines. They rely on *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1374 (3d Cir. 1993), where the Third Circuit held that Gettysburg College owed a duty of care to a lacrosse player who suffered a cardiac arrest during a lacrosse game because the college "actively sought his participation in that sport." *Id.* at 1368. The NCAA claims *Kleinknecht* is inapplicable because it applies only to situations where a player has been "actively recruited" by an institution. Defendant's Reply Memorandum, at 9. This argument misreads *Kleinknecht* as the Third Circuit merely identified recruiting as one possible example of a college actively seeking a player's participation. Although the NCAA does not "recruit" athletes, it does actively seek – and benefit from - their participation in a variety of other ways including advertising, merchandise sales, and television contracts.

At this preliminary stage before discovery, we cannot say that plaintiffs have "clearly and without a doubt fail[ed] to state a claim . . . under any theory of law" as plaintiffs have specifically identified at least four possible theories for the existence of a duty. Though the NCAA disputes the plaintiffs' version of facts underlying these theories, we must accept them as true – and all inferences reasonably deducible from them. Accordingly, defendant's preliminary objections are OVERRULED.

BY THE COURT:

Katherine B. Emery

KATHERINE B. EMERY, JUDGE

Exhibit I

2005 WL 3556406

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Ninth District, Summit County.

Delmas **BAUGHMAN**, et al. Appellants
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY Appellee.

No. 22204. | Decided Dec. 30, **2005**.

Synopsis

Background: Policyholders brought class action against insurer, arising out of insurer's failure to disclose the effect of Supreme Court's *Martin* decision on the value of uninsured/underinsured motorist (UM/UIM) coverage for multiple vehicles. The Court of Common Pleas, Summit County, No. CV 1995 08 2982, awarded summary judgment to insurer. Policyholders appealed. While appeal was pending, policyholders moved to unseal certain documents. The motion was denied, and policyholders appealed. The Court of Appeals, 160 Ohio App.3d 642, 828 N.E.2d 211, reversed and remanded, and stayed the appeal on the merits pending resolution of the issue involving the documents. After issue was resolved, the stay was lifted.

Holdings: The Court of Appeals, Moore, J., held that:

[1] triable issue existed as to whether insurer's business practices created a fiduciary relationship;

[2] triable issue existed as to whether insurer's policy renewal notices constituted a material misrepresentation;

[3] triable issue existed as to whether policyholders justifiably relied on insurer's alleged misrepresentations;

[4] trial court was required to consider policyholders' summary judgment affidavits;

[5] sufficient evidence established that insurer voluntarily assumed a duty to disclose relevant changes in insurance law;

[6] triable issue existed as to whether policyholders relied on insurer to inform them of relevant changes in law; and

[7] policyholders failed to allege that they sustained a physical injury.

Affirmed in part, reversed in part, and remanded.

Slaby, P.J., filed dissenting opinion.

West Headnotes (7)

[1] Judgment
Insurance cases

Genuine issue of material fact as to whether insurer's business practices encouraging policyholders to trust insurer created a fiduciary or other special relationship between insurer and policyholders, such as would give rise to an obligation to inform policyholders of relevant changes in insurance law, precluded summary judgment on constructive fraud claim in policyholders' class action against insurer arising out of insurer's failure to inform policyholders as to the effect of Supreme Court's *Martin* decision on the value of uninsured/underinsured motorist (UM/UIM) coverage for multiple vehicles. Rules Civ.Proc., Rule 56(C).

1 Cases that cite this headnote

[2] Judgment
Insurance cases

Genuine issue of material fact existed as to whether insurer's failure to distinguish between uninsured/underinsured motorist (UM/UIM) coverage purchased for a policyholder's first vehicle and coverage purchased for additional vehicles, in policy renewal notices sent to policyholders after Supreme Court's

Martin decision invalidated the "other owned vehicle" exclusion in UM/UIM coverage, constituted a material misrepresentation, for purposes of summary judgment on active fraud claim brought by class of policyholders who were unaware of the *Martin* decision. Rules Civ.Proc., Rule 56(C).

Cases that cite this headnote

[3] **Judgment**

Insurance cases

Genuine issue of material fact existed as to whether class of policyholders who maintained uninsured/underinsured motorist (UM/UIM) coverage for multiple vehicles justifiably relied on insurer's alleged misrepresentations as to the value of such coverage following Supreme Court's *Martin* decision invalidating the "other owned vehicles" exclusion in UM/UIM coverage, for purposes of summary judgment on policyholders' active fraud claim against insurer. Rules Civ.Proc., Rule 56(C).

Cases that cite this headnote

[4] **Judgment**

Hearing and determination

Trial court could not award summary judgment to insurer on active fraud claim brought by class of policyholders, arising out of insurer's failure to disclose the effect of Supreme Court's *Martin* decision on the value of uninsured/underinsured motorist (UM/UIM) coverage for multiple vehicles, without considering summary judgment affidavits submitted by class representatives or explaining its failure to consider such affidavits. Rules Civ.Proc., Rule 56(C).

Cases that cite this headnote

[5] **Insurance**

Actions in general; evidence

Sufficient evidence established that insurer voluntarily assumed a duty to disclose relevant changes in insurance law to policyholders, for purposes of claim asserted by class of policyholders for breach of that assumed duty; insurer took an advisory role toward policyholders whereby its agents helped policyholders make informed decisions, and insurer's executives testified that insurer typically disclosed information regarding changes in premiums, changes in law, coverage issues, and safety issues to policyholders.

2 Cases that cite this headnote

[6] **Judgment**

Insurance cases

Genuine issue of material fact existed as to whether policyholders relied on insurer to inform them of relevant changes in insurance law in making their coverage decisions, for purposes of summary judgment on claim asserted by class of policy holders for breach of an assumed duty to inform policyholders about the effect of Supreme Court's *Martin* decision on the value of uninsured/underinsured (UM/UIM) coverage for multiple vehicles. Rules Civ.Proc., Rule 56(C).

Cases that cite this headnote

[7] **Insurance**

Fraud or misrepresentation; concealment

Policyholders failed to allege that they sustained a physical injury as a result of insurer's failure to disclose the effect of Supreme Court's *Martin* decision on the value of uninsured/underinsured motorist (UM/UIM) coverage for multiple vehicles and, thus, did not state a claim against insurer for breach of an assumed duty to inform policyholders of relevant changes in insurance law; policyholders alleged only the economic injury of paying premiums that provided them with no additional insurance protection.

3 Cases that cite this headnote

Appeal from Judgment Entered in the Court of Common Pleas County of Summit, Ohio, Case No. CV 1995 08 2982.

Attorneys and Law Firms

David M. Paris and Kathleen J. St. John, Attorneys at Law, Cleveland, for Appellants.

Mark A. Johnson, Attorney at Law, Columbus, for Appellee.

Henry A. Hentemann, Attorney at Law, Cleveland, for Appellee.

DECISION AND JOURNAL ENTRY

MOORE, Judge.

***1** This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

{¶ 1} Appellants, Delmas **Baughman**, et al., appeal from the judgment of the Summit County Court of Common Pleas which granted summary judgment in favor of Appellee, **State Farm** Mutual Automobile Insurance Co. This Court affirms in part and reverses in part.

I.

{¶ 2} This case arises from Appellee's, **State Farm** Mutual Automobile Insurance Co. ("**State Farm**"), provision and marketing of uninsured/underinsured motorist ("UM/UIM") coverage to policyholders in multi-vehicle households after the Ohio Supreme Court released its opinion in *Martin v. Midwestern Group Ins. Co.* (1994), 70 Ohio St.3d 478, 639 N.E.2d 438. In *Martin,* the Ohio Supreme Court held that when UM/UIM coverage arises under R.C. 3937.18, a policy exclusion which requires that the insured be operating a specific vehicle identified in the policy, i.e. an "other owned vehicle exclusion", is invalid. Under *Martin,* an insured is entitled to UM/UIM coverage under a policy even if the insured was not in an insured vehicle at the time of the accident, so long as one family member in the insured's household purchased UM/UIM coverage. Consequently, upon the pronouncement of *Martin,* a policyholder in a multi-vehicle household could cancel all but one UM/UIM policy and still retain full UM/UIM coverage for all members of the household. The only benefit of maintaining more than one UM/UIM policy (or carrying UM/UIM coverage for each insured vehicle) after *Martin* is that any additional UM/UIM policies would cover guest passengers riding in a vehicle where UM/UIM coverage was specifically purchased.

{¶ 3} This action was brought on behalf of all **State Farm's** policyholders in Ohio who, between October 5, 1994 and September 3, 1997, [1] had more than one household vehicle insured by **State Farm** on which UM/UIM coverage was simultaneously applicable and for which multiple premiums had been paid. All of Appellants' claims arise from **State Farm's** failure to disclose the *Martin* decision to its policyholders. The action filed below alleges that, as a result of the Supreme Court's decision in *Martin,* **State Farm's** policyholders who purchased UM/UIM coverage on more than one vehicle were no longer receiving the same benefit they received prior to *Martin.* Appellants contend that **State Farm** had a duty to disclose this information to its policyholders. Moreover, Appellants assert that **State Farm** consciously chose not to inform policyholders of this change because such notification would cause a large number of policyholders to cancel their additional UM/UIM coverage which would adversely impact **State Farm's** profits.

{¶ 4} Appellants filed their original complaint on August 28, 1995 and amended the complaint several times. [2] The most recent complaint, filed on November 20, 2001, alleged claims of fraud, constructive fraud, unjust enrichment, negligence and breach of assumed duty to disclose and sought reimbursement of insurance premiums. On January 24, 2003, **State Farm** filed a motion for summary judgment on all of Appellants' claims, essentially alleging that they had no legal duty to apprise Appellants of the *Martin* decision and that Appellants' claims thus fail as a matter of law. Appellants were granted a Civ. R. 56(F) extension of time to prepare their brief in opposition, which they filed on September 19, 2003. **State Farm** filed its reply brief on October 10, 2003 and Appellants filed their surreply on October 20, 2003. On

June 18, 2004, the trial court entered its judgment, granting State Farm's summary judgment motion in its entirety.

*2 {¶ 5} Appellants timely filed a notice of appeal on July 16, 2004 and have raised three assignments of error for our review. On May 2, 2005, we stayed Appellants' appeal pending the trial court's resolution of an issue regarding documents filed under seal. Upon the trial court's resolution of these issues, we lifted the stay and resumed the appeal on September 12, 2005.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO [STATE FARM] ON [APPELLANTS'] CONSTRUCTIVE FRAUD CLAIM."

[1] {¶ 6} In their first assignment of error, Appellants allege that the trial court erred in granting summary judgment to State Farm on Appellants' constructive fraud claim. We agree.

{¶ 7} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12, 467 N.E.2d 1378, certiorari denied (1986), 479 U.S. 948.

{¶ 8} Pursuant to Civil Rule 56(C), summary judgment is proper if:

"(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 9} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93, 662 N.E.2d 264. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. Id. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735, 600 N.E.2d 791.

{¶ 10} The two named Plaintiffs in this class action, Rosemarie DiPalma and Gary Heiland, are the only representatives of the certified class. As class representatives, DiPalma and Heiland have the burden of proving the claims asserted on behalf of the class. State Farm contends that because DiPalma and Heiland's claims fail, the class action plaintiffs' claims also fail. See *Young v. Klausner Cooperage Co.* (1956), 164 Ohio St. 489, 491, 132 N.E.2d 206 (if the class representatives' claims fail, the claims of all those plaintiffs he or she represents will also fail).

*3 {¶ 11} In support of its motion for summary judgment, State Farm relied on depositions of the named plaintiffs. State Farm cited the named plaintiffs' testimony to demonstrate that they had not relied on State Farm's prior communications in making their purchasing decisions. Appellants filed several documents in support of their brief in opposition, including depositions of State Farm executives and affidavits from Heiland and DiPalma.

{¶ 12} Appellants have alleged claims for both actual and constructive fraud. An action for actual fraud is based on an affirmative misrepresentation whereas an action for constructive fraud results from the "failure to disclose facts of a material nature where there exists a duty to speak." *Layman v. Binns* (1988), 35 Ohio St.3d 176, 178, 519 N.E.2d 642. The Ohio Supreme Court has identified the elements of fraud as: (1) a representation, or where there is a duty to disclose, concealment of a fact; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to

whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance. *Cohen v. Lamko, Inc.* (1984), 10 Ohio St.3d 167, 169, 462 N.E.2d 407.

{¶ 13} In Appellants' constructive fraud claim they allege that **State Farm's** failure to disclose *Martin* amounts to fraud and/or misrepresentation and that they should be held accountable for this inaction. Appellants allege that **State Farm** had a duty to speak because **State Farm** had entered into a fiduciary or *de facto* confidential relationship with its policyholders. **State Farm** does not dispute that it did not apprise its policyholders of the *Martin* decision but rather contends that it had no legal duty to disclose this decision and that consequently, Appellants' claims fail as a matter of law.

{¶ 14} The trial court, relying on *Martin v. Grange Mut. Ins. Co.* (2001), 143 Ohio App.3d 332, 757 N.E.2d 1251 (*"Grange"*), held that **State Farm** had no *legal* duty to notify its policyholders of the *Martin* decision. *Grange* is a factually similar case wherein the plaintiffs alleged that Grange Mutual Insurance Company misled their policyholders by failing to inform them of the *Martin* decision. *Grange,* 143 Ohio App.3d 335. As in this case, the *Grange* plaintiffs sought recovery of premiums they paid for UM/UIM coverage that was of little to no value and/or conferred no additional benefit to the policyholders. Id.

{¶ 15} In *Grange,* the trial court granted summary judgment for the insurance company on the plaintiff's claims for (1) breach of contract, (2) breach of fiduciary duty, (3) misrepresentation and fraud based on a failure to disclose, (4) negligence, (5) conversion, (6) unjust enrichment and (7) declaratory relief with respect to their rights, liabilities, and obligations under the insurance contract, finding that Grange had no duty to disclose the *Martin* decision to its policyholders. Id. at 336, 639 N.E.2d 438. The court of appeals agreed with the finding that Grange had no legal duty to disclose the decision. Id. at 338, 639 N.E.2d 438.

***4** {¶ 16} However, the *Grange* appeals court reversed summary judgment on several claims including the fraud claim, finding that the appellee had "failed to fully address the appellants' claims with respect to breach of contract, breach of fiduciary duty, misrepresentation and *fraud predicated on a failure to disclose,* negligence, conversion, and unjust enrichment" and had failed to "sustain its burden of demonstrating a lack of genuine issue of material fact." [Emphasis added]. Id. at 339-340, 757 N.E.2d 1251. We find the following reasoning particularly relevant:

> "[W]e hold that an insurer, as a matter of law, is not required to advise all of its insureds of every change in insurance law.
>
> "Having said that, however, we wish to qualify our previous pronouncement by stating that even though an insurance company does not have a legal obligation to keep policyholders informed, circumstances may occur whereby an insurer obligates itself through prior conduct. In other words, if an insurance company has taken steps in the past to notify insureds of changes in the law bearing on coverage or some other term of a policy, the company may then be required to instruct policyholders on further reforms.
>
> "The determination of whether an insurance company has obligated itself to inform an insured of changes affecting his or her policy is obviously fact-dependent. A policyholder arguing that an insurer has violated this duty would clearly have to provide evidence that not only did the company fail to do so this time, but also that it was the insurer's practice in the past to provide this information." [Emphasis added]. Id. at 339, 757 N.E.2d 1251.

The *Grange* court's finding that the insurer owed no legal duty to notify its insureds of *Martin* must, therefore, be read in conjunction with its reversal of summary judgment on the fraud claim and its instruction that, on remand, the trial court should "consider issues of past practice." Id. at 342, 639 N.E.2d 438.

{¶ 17} In its discussion of the *Grange* case, the trial court below did not address this portion of the holding. The trial court considered only whether **State Farm** had a legal duty or had assumed a duty to disclose the *Martin* decision. We find that the trial court erred in failing to consider that an insurance company may obligate itself to notify its policyholders of decisions such as *Martin* that impact insurance purchasing decisions by entering into a fiduciary or similar relationship with its policyholders.

{¶ 18} While we find that the existence of a legal duty is a question of law for the court, the existence of a fiduciary

duty or similar relationship is a factual question for the trier of fact. *Clark v. BP Oil Co.,* 9th Dist. No. 21398, 2003-Ohio-3917, at ¶ 8; *Cope v. Metropolitan Life Ins. Co.* (1998), 82 Ohio St.3d 426, 437, 696 N.E.2d 1001. The *Grange* court specifically found that "[t]he determination of whether an insurance company has obligated itself to inform an insured of changes affecting his or her policy is obviously fact-dependent." *Grange,* 143 Ohio App.3d at 339, 757 N.E.2d 1251.

***5** {¶ 19} "[A] duty to disclose arises primarily in a situation involving a fiduciary or other similar relationship of trust and confidence." *Federated Mgt. Co. v. Coopers & Lybrand* (2000), 137 Ohio App.3d 366, 384, 738 N.E.2d 842. Courts have defined a fiduciary relationship as one in which "special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." Id. citing *Ed Schory & Sons, Inc. v. Soc. Natl. Bank* (1996), 75 Ohio St.3d 433, 442, 662 N.E.2d 1074, 1081-1082. "The duty to speak does not necessarily depend on the existence of a fiduciary relationship. It may arise in any situation where one party imposes confidence in the other because of that person's position, and the other party knows of this confidence." (Internal citations omitted). *Starinki v. Pace* (1987), 41 Ohio App.3d 200, 203, 535 N.E.2d 328.

{¶ 20} We find further support for our disposition of this issue in *Cope. Cope,* 82 Ohio St.3d 426, 696 N.E.2d 1001. In *Cope,* the Ohio Supreme Court held that a group of insureds met the requirement for class certification in their fraud action against Metropolitan Life Insurance Company ("Met Life") for intentionally omitting mandatory disclosures in their sales of replacement insurance as new insurance. Id. at 437, 696 N.E.2d 1001. According to the Court, "[i]f the jury finds that a reasonable person under these circumstances would repose special confidence and trust in MetLife to disclose material information, it may infer the existence of a fiduciary duty across the entire class." Id. citing *Logsdon v. Natl. City Bank* (1991), 62 Ohio Misc.2d 449, 460-61, 601 N.E.2d 262 (finding that action is maintainable as class action and that a fiduciary duty arises from a relationship "in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust" (internal citations omitted.)).

{¶ 21} Under this guidance, we find that a factual issue remains regarding the existence of a fiduciary or other relationship between the parties that would give rise to a duty to disclose the *Martin* decision. Construing the evidence in the light most favorable to Appellants, as we must with a motion for summary judgment, we find the record replete with evidence that State Farm works diligently to develop relationships whereby its clients place trust and confidence in their agents to inform them of information that impacts their coverage. See *Viock,* 13 Ohio App.3d at 12, 467 N.E.2d 1378. State Farm's business procedures clearly emphasize the creation of a "good neighbor" relationship with insureds and "trust" is a central theme of its business plan. We are persuaded by evidence that State Farm markets itself as a trustworthy insurance agency upon which customers can rely to help them make the best decisions regarding their insurance policies. Moreover, State Farm instructs its agents to develop long-term trusting relationships with their policyholders and informs agents that they can develop these relationships through honesty, integrity and by looking out for their client's best interest. Evidence that State Farm has advised their agents to "place their clients' interests ahead of their own" further underscores this conclusion.

***6** {¶ 22} State Farm executives testified that the company distinguishes itself from competitors through its unique agent-policyholder relationship. Unlike its competitors, State Farm's marketing process involves using their "agents as a conduit through verbal communication" instead of written communication. State Farm executives explained that the company has continued using this marketing process because of the high value of the agents' relationships with their insureds.

{¶ 23} The record also contains evidence that State Farm viewed itself as occupying an advisor type relationship with its customers, as opposed to a debtor-creditor relationship. See *Logsdon,* 62 Ohio Misc.2d at 460-61, 601 N.E.2d 262 (holding that "[a] mere debtor-creditor relationship without more does not create a fiduciary relationship"). State Farm's history of disclosing important information to their policyholders such as changes in the law and changes in coverage further demonstrates the advisory nature of its relationship with clients.

{¶ 24} State Farm executives also admitted that State Farm's knowledge of the legislature's actions and their

impact on insurance law was far superior to that of its policyholders. Correspondence amongst **State Farm** executives regarding the *Martin* decision demonstrates that **State Farm** knew that it had superior knowledge and therefore a greater duty to inform its insureds of changes in the law, specifically *Martin,* that impact their purchasing decisions.

{¶ 25} While we do not depart from the precedent that absolves insurance companies of the legal obligation to advise insureds of every change in insurance law, we adopt the *Grange* court's reasoning and find that insurance companies may, through their past practices, obligate themselves to disclose changes in the law. *Grange,* 143 Ohio App.3d at 339, 757 N.E.2d 1251. **State Farm** has purposefully sought to set itself apart as the *most* trustworthy insurance company-the one that treats its customers as neighbors. After years of profiting from this marketing strategy, **State Farm** cannot disavow this attribute when it is financially advantageous. We sustain Appellants' first assignment of error.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO [**STATE FARM**] ON [APPELLANTS'] ACTIVE FRAUD CLAIM."

{¶ 26} In their second assignment of error, Appellants allege that the trial court erred in granting summary judgment to **State Farm** on Appellants' active fraud claim. We agree.

{¶ 27} Appellants' active fraud claim is predicated on the theory that **State Farm's** renewal notices were misleading and contained misrepresentations upon which they relied in their purchasing decisions. The trial court found that Appellants' active fraud claim failed because they had not identified a specific fact that was misrepresented in **State Farm's** renewal statements and declaration pages and further failed to establish justifiable reliance.

Misrepresentation

*7 **[2]** {¶ 28} Given our determination that a genuine issue of material fact remains regarding the duty to disclose elements of a fraud claim, we need not reexamine that element. We will therefore first examine whether Appellants identified a fact that was misrepresented. Appellants claim that the policy renewal notices **State Farm** sent out after *Martin* were misleading because they refer to UM/UIM coverage purchased on vehicles # 2, 3, 4, etc. in the same manner as they refer to the same coverage on vehicle # 1. Appellants assert that these statements are misrepresentations because, after *Martin,* coverage on vehicles # 2, 3, 4, etc. is merely "Guest UM Coverage", yet nothing in the renewal notice apprises the policyholder of this fact.

{¶ 29} **State Farm** contends that Appellants have failed to identify an actual misrepresentation of fact in the renewal notice itself. Accordingly, they assert that Appellants have not sustained their burden of identifying an affirmative misrepresentation. **State Farm** argues that Appellants have admitted that the renewal policy did not contain a false statement when they acknowledged that UM/UIM coverage on more than one household vehicle has "some value" after *Martin.*

{¶ 30} We are mindful that conduct, such as "an assertion not in accordance with the truth" may amount to a misrepresentation for fraud purposes. *Russ v. TRW, Inc.* (1991), 59 Ohio St.3d 42, 49, 570 N.E.2d 1076 citing 3 Restatement of the Law 2d, Torts (1965), Section 525, Comment b. Under this guidance, we find **State Farm's** argument regarding the value of UM/UIM coverage after *Martin* unpersuasive. Although such coverage arguably had some value after *Martin,* it is indisputable that this value was not the same as pre-*Martin* when a policyholder needed UM/UIM coverage on all vehicles in order to retain full UM/UIM coverage for all members of the household. The only benefit of maintaining more than one UM/UIM policy (or carrying UM/UIM coverage for each insured vehicle) after *Martin* is that any additional UM/UIM policies would cover guest passengers riding in a vehicle where UM/UIM coverage was specifically purchased. Both class representatives testified that they did not realize that UM/UIM coverage on vehicles # 2, 3, 4, etc. was only for the financial benefit of guest passengers-who may have already had such coverage. We find Heiland's testimony particularly compelling:

> Q. "Did **State Farm** ever give you false or misleading information?
>
> A. "Well, they didn't let me know in my terms where I could, when I had the three vehicles or four, I could have had uninsured motorist on one and it would have been

covered on all of them, instead of paying the premiums for all three or four. If I would have known I had that choice, yeah, I would have dropped that, because I'm looking for a good deal. What should I pay for something I already have?"

Q. "And when was your recollection or when do [SIC] you understand that that false or misleading information was given?

***8** A. "Just until recently. If I had known back then, it would have been a different story."

{¶ 31} State Farm employees admitted that State Farm stood to lose significant profits if and when policyholders learned of *Martin'* s effect, i.e. that they did not have to maintain UM/UIM coverage on household vehicles other than vehicle # 1. Because UM/UIM coverage clearly had a different value after *Martin,* we find that a genuine issue of material fact remains as to whether State Farm's act of referring to UM/UIM coverage after *Martin* in the same manner as before *Martin* constitutes a material misrepresentation. *Russ,* 59 Ohio St.3d 42, 49, 570 N.E.2d 1076.

Justifiable Reliance

[3] {¶ 32} State Farm contends that summary judgment was properly granted in their favor because Appellants failed to demonstrate a genuine issue of material fact with regard to the justifiable reliance element. In support of this contention, State Farm maintains that neither class representative established justifiable reliance through their deposition testimony and further contends that neither class representative's affidavit established justifiable reliance because the affidavits are "self-serving" and conflict with their deposition testimony.

[4] {¶ 33} First, we note that the trial court made no specific reference to the named plaintiffs' affidavits in its order granting summary judgment. Further, the trial court provided no explanation for its failure to consider the affidavits. Civ. R. 56(C) requires a trial court to "examine all appropriate materials filed by the parties before it when ruling on a motion for summary judgment." *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358, 604 N.E.2d 138. We find the trial court's failure to consider this evidence, without explanation, reversible error.

{¶ 34} Even assuming that the trial court considered these affidavits, we nonetheless find a genuine issue of fact regarding the justifiable reliance element. Again, we note that the trial court must construe the evidence in the light most favorable to the nonmoving party. See *Viock,* 13 Ohio App.3d at 12, 467 N.E.2d 1378. Heiland testified that he "usually read everything" he received from State Farm, examined the "auto renewal statement" to determine what coverages he had and he would contact his insurance agent if he "saw a discrepancy on his premiums[.]" Moreover, in his affidavit he testified:

> "Affiant relied on the information contained in the auto renewal notices concerning the type of the insurance coverages he had purchased from State Farm. Based upon the renewal notices for the period from October 1994 through September 1997, it was never Affiant's understanding that 'Coverage U' for household cars # 2 and # 3 was for the financial benefit of guest passengers only. Had Affiant understood that, he would not have purchased 'Coverage U' on household cars # 2 and # 3. Instead, to make sure that guests were protected, he would have only driven them in household car # 1, *i.e.,* the household vehicle with 'Coverage U." '

***9** {¶ 35} DiPalma's affidavit contains substantially the same statement. In her affidavit, DiPalma also testified that if State Farm had apprised her of the effects of *Martin,* she would have cancelled her additional UM/UIM coverage. State Farm contends that DiPalma's affidavit conflicts with her deposition testimony in which she agreed that she was not relying on the papers State Farm sent her but, was instead relying on her State Farm agent to give her the right advice regarding her policy purchases. This testimony must be considered in conjunction with deposition testimony that she felt overwhelmed by the high volume of State Farm mailings she received, but would nonetheless read these documents. DiPalma also testified that she relied on her State

Farm agent because she had difficulty comprehending the insurance policy and needed her agent to explain the policy "in simple language."

{¶ 36} Upon review, we find that DiPalma's affidavit supplements her deposition testimony. In her deposition, she testified that she read or reviewed the documents sent to her by State Farm but relied on her State Farm agent to aid her in understanding what these documents meant. Read in the light most favorable to DiPalma, we find a genuine issue of material fact remains as to whether she relied on misrepresentations in her policy renewal notices.

{¶ 37} The Ohio Supreme Court has held that "because summary judgment is a procedural device to terminate litigation, it must be awarded with caution. Doubts must be resolved in favor of the non-moving party." *Murphy,* 65 Ohio St.3d at 359, 604 N.E.2d 138. We therefore find that a genuine issue of material fact remains with regard to the misrepresentation and justifiable reliance elements of an active fraud claim, we sustain Appellants' second assignment of error.

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE ASSUMED DUTY CLAIM."

{¶ 38} In their third assignment of error, Appellants allege that the trial court erred in granting summary judgment to State Farm on Appellants' assumed duty claim. We disagree.

{¶ 39} The trial court found that Appellants' assumed duty claim failed because (1) Appellants did not establish reliance on State Farm's assumed duty to disclose changes in the law, (2) Appellants' alleged failure to act in accordance with their assumed duty did not increase Appellants' risk of harm and (3) Appellants failed to assert physical injury. The trial court did not analyze whether State Farm had undertaken a duty to disclose changes in the law. Implicit in the trial court's finding, therefore, is the finding that State Farm assumed the duty to inform its policyholders of changes in the law that would impact their coverage and purchasing decisions.

{¶ 40} Appellants claim that, by virtue of State Farm's past conduct, they assumed a duty to disclose significant changes in insurance law which impact their coverage and purchasing decisions. Appellants contend that State Farm breached its assumed duty when it failed to inform its policyholders of the *Martin* decision. Notably, neither party disputes that State Farm did not apprise its policyholders of the *Martin* decision even though it had previously notified policyholders of changes in the law. Nonetheless, State Farm contends that Appellants' claim fails as a matter of law on two essential elements of an assumed duty claim: physical injury and reliance. While we disagree with the court's analysis of the reliance issue, we agree that Appellants have failed to allege physical injury.

***10** {¶ 41} Under the assumed duty doctrine, "one who gratuitously undertakes a voluntary act assumes the duty to complete it with the exercise of due care under the circumstances." *Seley v. G.D. Searle & Co.* (1981), 67 Ohio St.2d 192, 202, 423 N.E.2d 831, citing *Briere v. Lathrop Co.* (1970), 22 Ohio St.2d 166, 172, 258 N.E.2d 597. Although the Ohio Supreme Court has not expressly adopted the Restatement section from which it gleans the assumed duty doctrine definition, it cited this section with approval in both *Seley* and *Briere.* [3]

{¶ 42} To recover for a breach of assumed duty claim, one must establish (1) reliance on an assumed duty or (2) an increased risk of harm, and (3) physical injury. See *Seley,* 67 Ohio St.2d 192, 202, 423 N.E.2d 831; *Rine v. Sabo* (1996), 113 Ohio App.3d 109, 118, 680 N.E.2d 647. To demonstrate that one has voluntarily assumed a duty, one must establish reliance on the undertaking. *Power v. Boles* (1996), 110 Ohio App.3d 29, 34, 673 N.E.2d 617.

Assumption of Duty

[5] {¶ 43} We find no error in the trial court's implicit conclusion that State Farm assumed a duty to disclose changes in the law. The record was replete with testimony from State Farm executives that, when construed most favorably to Appellants, established that State Farm historically disclosed information to its policyholders regarding changes in premiums, changes in the law, coverage issues and safety issues. The record also contained evidence that State Farm had assumed an advisory role whereby its clients relied on State Farm agents to help them make

informed purchasing decisions. We now examine whether (1) Appellants relied on this duty and if so, (2) suffered physical injury as a result of their reliance.

Reliance

[6] {¶ 44} As to the element of reliance, we find that the trial court failed to construe the evidence in a light most favorable to Appellants. The trial court focused on portions of testimony that negated reliance, ignoring testimony that demonstrated reliance. The trial court narrowly focused on whether Appellants had relied on "prior communications from **State Farm** about the other owned vehicle exclusion to make insurance purchase decisions." The court explained:

> "The Plaintiffs contend that, since **State Farm** advised policyholders about the invalidity of the other owned vehicle exclusion in 1982, then **State Farm** voluntarily assumed a duty to tell policyholders about the *Martin* decision twelve (12) years later. However, the evidence establishes that only Plaintiff Heiland was a **State Farm** policyholder in 1982, at the time of that notice. * * * Thus, because he was the only policyholder in 1982, only Heiland has standing to assert reliance on the 1982 notice."

{¶ 45} This statement reflects an unnecessarily restrictive standard for measuring reliance. The facts that Heiland did not understand the 1982 disclosure and that DiPalma was not a policyholder in 1982 are not dispositive of the reliance issue. The evidence reflects that Appellants read everything they received from **State Farm** and more importantly, relied on their agents to provide the information they required to make informed purchasing decisions.

***11** {¶ 46} Heiland testified that he had received prior notifications from **State Farm** regarding changes in the law. More importantly, Heiland testified that he generally read every document he received from **State Farm** to determine whether his premiums or coverage had changed.

Q. "What do you do when you get something from **State Farm** in the mail?

A. "I usually read everything. I'm saying I don't understand everything, but I try to read everything. If everything corresponds with my premiums, I'm fine, I'm happy.

Q: "If you don't understand something you read, what would you do?

A. "Well, like I said, if I don't see an increase in my premiums, I don't feel a need to go any further on things, unless it's the bold print or saying 'Attention.' I'm just no different than anybody else."

And

Q. "What kind of documents would you receive from **State Farm** as a policyholder?

A. " * * *

"There's —— I've got things on changes of Ohio law I've seen in my little stubs.

" * * *

Q. "You mentioned you would look to the **auto** renewal statement for the purpose of determining what coverages you had. If you had a question, though, about the scope of a coverage or whether it applied in a certain situation, what would you do to resolve that question?

A. "I would probably get a hold of my insurance agent. He's the arm of **State Farm**, so he's the one with all the knowledge."

DiPalma similarly testified:

A: " * * *

> "In the case of insurance policies, car insurance, half the time I do not understand what they are talking about, so I rely on the person who is the representative of the company to tell me in simple terms what things mean.

Q: "Now, I think I understand. So you might have the insurance company or ask the representative or the agent for an explanation of what the policy means or what language in the document might mean?

A. "Right. Exactly."

{¶ 47} When read in the light most favorable to Appellants, DiPalma and Heiland's testimony warrants the inference that they relied on State Farm to provide them with information, such as changes in the law, that impact purchasing decisions. State Farm had fostered a trusting relationship with DiPalma and Heiland and they, in turn, were accustomed to this relationship. Construing the evidence in the light most favorable to Appellants, DiPalma and Heiland's testimony creates at least a genuine issue of material fact as to whether they relied on the duty which State Farm assumed. *Temple,* 50 Ohio St.2d at 327, 364 N.E.2d 267.

{¶ 48} Under Ohio law, "reliance" and "increased risk of harm" are alternative means of establishing proximate cause and Appellants only need to establish one to avoid summary judgment. *Rine,* 113 Ohio App.3d at 118, 680 N.E.2d 647; *Wissel v. Ohio High School Athletic Assn.* (1992), 78 Ohio App.3d 529, 540, 605 N.E.2d 458 (recognizing that to establish an assumed duty claim, one must demonstrate that the "alleged failure to exercise reasonable care either (a) increased the risk of harm, or (b) induced detrimental reliance"). In light of our disposition of the "reliance" element, we need not examine the "increased risk of harm" element.

Physical Injury

***12** [7] {¶ 49} Although the trial court held that Appellants had failed to allege any physical injury, we are mindful that the court did not exclude the possibility that Appellants *could* allege physical injury. The relevant portion of the trial court's order states:

> "The Court first finds that summary judgment on the Plaintiffs' assumed duty claim is appropriate because the Plaintiffs have not alleged any physical injury. Even if a physical injury was alleged, summary judgment is appropriate because the Plaintiffs have failed to allege or established (SIC) that they relied upon any assumed duty of State Farm to disclose changes in Ohio law and because the Plaintiffs have failed to establish that State Farm's failure to follow an assumed duty increased the Plaintiffs' risk of harm." (Emphasis added).

{¶ 50} Appellants have asserted an economic injury, i.e. payment of insurance premiums that provided no additional insurance protection, and contend that such injury suffices as a "physical injury." Appellants cite *Grange,* 143 Ohio App.3d 332, 757 N.E.2d 1251, a case that both the trial court and both parties heavily relied upon, in support of this contention. The *Grange* court held that, through its past practices, an insurance company could obligate itself to disclose changes in the law which impact coverage. Under this reasoning, a plaintiff could allege a viable breach of assumed duty claim notwithstanding the lack of physical injury. Id. at 339, 757 N.E.2d 1251.

{¶ 51} We are not persuaded by this argument. Foremost, we note that the *Grange* decision is devoid of any discussion of the specific elements of an assumed duty claim-let alone the physical injury element. Id. Moreover, Appellants have cited no authority, nor can we find any, that expressly allowed recovery under an assumed duty claim despite the lack of physical injury. Our review of relevant case law persuades us that a claimant must demonstrate physical injury, not mere economic loss, in order to state a viable breach of assumed duty claim. See *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc.* (N.D.Ohio 1998), 23 F.Supp.2d 771, 794 (applying Ohio law and holding that plaintiffs could not establish a claim under breach of assumed duty where they failed to allege physical harm); *Briere,* 22 Ohio St.2d 166, 258 N.E.2d 597 (citing 2 Restatement of Law, Torts, 2d Section 323 and holding employee liable for co-worker's injuries where employee voluntarily assumed duty to assist co-worker in moving scaffolding and co-worker fell); *Rine,* 113 Ohio App.3d at 118, 680 N.E.2d 647 (finding that fraternity did not assume duty to protect student who was allegedly sexually assaulted) and *Wissel,* 78 Ohio App.3d at 540, 605 N.E.2d 458 (plaintiff could not recover under assumed duty claim for injuries sustained in football game where they could not establish reliance on actions of defendants). See also *Seley,* 67 Ohio St.2d at 202, 423 N.E.2d 831. Absent evidence of physical injury, we must affirm the trial court's grant of summary judgment on Appellants' assumed duty claim. Appellants' third assignment of error is overruled.

III.

***13** {¶ 52} Appellants' first and second assignments of error are sustained. Appellant's third assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed in part and reversed in part and the cause remanded for further proceedings consistent with this opinion.

Judgment affirmed in part, reversed
in part, and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.

Exceptions.

CARR, J. concurs.

SLABY, P.J. dissents, saying.

SLABY, P. J.

{¶ 53} The majority notes, and I agree, that that an insurance company may oblige itself to notify policyholders of decisions such as *Martin* that impact insurance purchasing decisions by entering into a fiduciary relationship with its policyholders. It follows, therefore, that without having established a fiduciary relationship or similar relationship between the insurance company and its policyholders, there is no duty to disclose. See *Federated Mgt. Co. v. Coopers & Lybrand* (2000), 137 Ohio App.3d 366, 384, 738 N.E.2d 842; *Martin v. Grange Mut. Ins. Co.* (2001), 143 Ohio App.3d 332, 339, 757 N.E.2d 1251.

{¶ 54} Appellants have appealed the trial court's decision granting summary judgment to Appellee, State Farm. As stated above, summary judgment may be properly granted when: (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can only reach one conclusion, and that conclusion is adverse to the non-moving party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 55} To prevail on a motion for summary judgment, the moving party must be able to point to evidentiary materials that show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. Civ.R. 56(E) provides that after the moving party has satisfied its burden of supporting its motion for summary judgment, the non-moving party may overcome summary judgment by demonstrating that a genuine issue exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St.3d 447, 449, 663 N.E.2d 639.

***14** {¶ 56} I believe that, contrary to the majority's decision, Appellants have not met the *Dresher* standard in showing that there are genuine factual issues remaining to be litigated. The majority found that a factual issue remained regarding the existence of a fiduciary relationship between the parties that would give rise to a duty to disclose the *Martin* decision. I disagree.

{¶ 57} A fiduciary is one who, due to his own undertaking, has a duty to act "primarily for the benefit of another in matters connected with his undertaking." (Emphasis omitted.) *Haluka v. Baker* (1941), 66 Ohio App. 308, 312, 34 N.E.2d 68; *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 216, 527 N.E.2d 1235. A fiduciary relationship entails a "special confidence and trust." *Culbertson v. Wigley Title Agency, Inc.* (Feb. 13, 2000), 9th Dist. No. 20659, at 7, quoting *In re Termination of Employment* (1974), 40 Ohio St.2d 107, 115, 321 N.E.2d 603. This confidence and trust "is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this

special trust." *Culbertson* at 7, quoting In *re Termination of Employment,* 40 Ohio St.2d at 115, 321 N.E.2d 603.

{¶ 58} Fiduciary relationships may arise from a formal agreement or de facto from an informal relationship, if the parties understand that a special trust or confidence has been reposed. *Culbertson* at 7, citing *Cairns v. Ohio Sav. Bank* (1996), 109 Ohio App.3d 644, 649, 672 N.E.2d 1058, citing *Umbaugh Pole Bldg. Co. v. Scott* (1979), 58 Ohio St.2d 282, 390 N.E.2d 320, paragraph one of syllabus. An informal relationship, however, cannot be unilateral, and occurs only where "both parties understand that a special relationship or trust has been reposed." *Culbertson* at 9, citing *Umbaugh Pole,* 58 Ohio St.2d, at 286, 390 N.E.2d 320.

{¶ 59} When alleging a breach of fiduciary duty, as Appellants are in this case, they must first prove the existence of a fiduciary relationship and then must prove the existence of a duty arising out of a fiduciary relationship, failure to observe that duty, and injury resulting proximately there from. *Culbertson,* at 7, citing *Strock,* 38 Ohio St.3d at 216, 527 N.E.2d 1235. In the absence of a showing of a fiduciary relationship, one will not owe fiduciary duties to another. *Culbertson* at 7, citing *In re Termination of Employment,* 40 Ohio St.2d at 115, 321 N.E.2d 603.

{¶ 60} I believe that Appellants have not met the *Dresher* burden necessary to overcome Appellee's motion for summary judgment. Appellee maintains that no fiduciary relationship was created between its agents and its policy holders, and thus, there was no duty to disclose. I find that Appellants failed to present any evidence tending to show that Appellee's agents intended to create fiduciary relationships with its policy holders. Consequently, I respectfully dissent from the majority's finding that a genuine issue of material facts exists as to whether or not a fiduciary relationship existed between the parties.

Parallel Citations

2005 -Ohio- 6980

Footnotes

1 The Ohio Supreme Court announced its decision in *Martin* on October 5, 1994. *Martin,* 70 Ohio St.3d 478, 639 N.E.2d 438. The legislation overruling *Martin* passed and was signed into law in early June 1997. This new legislation took effect on September 3, 1997.

2 This case was originally filed by Delmas **Baughman**, who passed away shortly after the commencement of this litigation. Cora **Baughman**, administratrix of his estate, was substituted in his place. Cora **Baughman** was later dismissed as a named plaintiff. Consequently, only Rosemarie DiPalma and Gary Heiland remain as class representatives.

3 2 Restatement of Law, Torts, 2d Section 323 states:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
> "(a) his failure to exercise such care increases the risk of such harm, or
> "(b) the harm is suffered because of the other's reliance upon the undertaking."

Exhibit J

Not Reported in F.Supp.2d, 2011 WL 4540957 (N.D.Ohio)
(Cite as: 2011 WL 4540957 (N.D.Ohio))

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Only the Westlaw citation is currently available.

United States District Court,
N.D. Ohio,
Eastern Division.
KOYO CORPORATION OF U.S.A., Plaintiff
v.
COMERICA BANK, et al., Defendants.

No. 1:10 CV 2557.
Sept. 29, 2011.

Adam D. Cornett, Julie A. Crocker, William J. Stavole, Taft Stettinius & Hollister—Cleveland, Cleveland, OH, for Plaintiff.

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ORDER

SOLOMON OLIVER, JR., Chief Judge.

***1** Currently pending before the court in the above-captioned case is Defendant Comerica Bank's ("Comerica") Motion to Dismiss Plaintiff Koyo Corporation of U.S.A.'s ("Koyo") Complaint in its entirety pursuant to Fed.R.Civ.P. 9(b) and 12(b)(6) (ECF No. 18). For the following reasons, the court grants in part and denies in part the Motion to Dismiss (ECF No. 18).

I. FACTUAL AND PROCEDURAL HISTORY

This case arises out of a purchase agreement between Koyo and Defendant Y.M.T. International, Inc. ("YMT"), and YMT's subsequent failure to perform on the contract as a result of an outstanding debt to its creditor.[FN1] Koyo is a South Carolina corporation registered to do business in the State of Ohio. (Am. Compl. ¶ 1, ECF No. 80.) YMT is a Michigan corporation registered to do business in the State of Ohio. (*Id.* ¶ 2.) Defendant Comerica is a Texas bank registered to do business in the State of Ohio. (*Id.* ¶ 3.) Koyo alleges the following in its Amended Complaint.

FN1. As of the date of this Order, YMT has not served its answer to the Complaint. On April 7, 2011, Plaintiff filed its application for entry of default pursuant to Rule 55(a) of the Federal Rules of Civil Procedure. (ECF No. 52.)

A. YMT's Default

On September 8, 2009, Comerica declared YMT in default on a Note dated November 14, 2008 ("YMT Note"). (*Id.* ¶ 12.) YMT, Defendant Yamamoto, LLC, Defendant Tomoji Yamamoto, Defendant Tsunetaka Iio, and Tatsuhiko Sakai (collectively, the "Guarantors"), are the Guarantors of the YMT Note. (*Id.* ¶ 13.) Despite the default, Comerica was willing to forbear collecting the amount due on the YMT Note until January 1, 2010, provided that YMT and the Guarantors accepted the conditions set forth in a forbearance agreement ("Forbearance Agreement"), dated September 8, 2009. (*Id.* ¶¶ 14–15; *see also* Forbearance Agreement, Ex. B, ECF No. 80–2.) Under the Forbearance Agreement, YMT had to apply 100% of its cash inflows to the amount due on the Note and retain Defendant Amherst Capital Partners, LLC ("Amherst") as a consultant. (*Id.* ¶ 16.) Amherst employee, Defendant Kevin R. English, managed the YMT account. (*Id.* ¶ 23.) YMT further agreed, under the Forbearance Agreement, that if either Amherst or YMT terminated the consulting contract, YMT would be in default on its Note. (*Id.*) At the time the Forbearance Agreement was entered into, principal in the amount of $780,744.81 and interest in the amount of $470.88 were due to Comerica on the YMT Note. (*Id.* ¶ 17.)

On or about February 16, 2010, the parties extended the Forbearance Agreement so that payment became due on March 31, 2010 ("First Amendment"). (*Id.* ¶¶ 18–19.) At the time the First Amendment was entered into, principal in the amount of $129,337.99 and interest in the amount of $1,255.79 were due on the YMT Note. (*Id.* ¶ 20.) Koyo alleges that the reduction in the amounts owed was due to the application of all monies received from Koyo, and likely other YMT customers, to the outstanding debt. (*Id.* ¶ 22.) Further, Koyo alleged that from September 2009 to December 2009, Comerica loaned YMT money based on certain YMT accounting records so that YMT could maintain the appearance that its business operations were proceeding as normal. (*Id.* ¶¶ 26–27.)

***2** Koyo maintains that Amherst, through its agent English, managed YMT's accounts and directed YMT to make payments only to selected vendors, creditors, and subcreditors, so that YMT's revenue would go towards paying the YMT Note. (*Id.* at ¶ ¶ 23–25.) Koyo alleges that as a result of the terms of the Forbearance Agreement, Comerica and Amherst had exclusive control over YMT's operations. (*Id.* ¶¶ 31–33.)

B. Koyo's Purchase Agreement With YMT

Around October 14, 2009, Koyo ordered from YMT a control box and fixture ("Control Box and Fixture"). (*Id.* ¶ 34.) The purchase agreement was comprised of two separate purchase orders; the amount due for the first was $98,760.00, and the amount due for the second was $63,057.00. (*Id.* ¶¶ 34–35, 37–38.) Koyo alleges that at the time of its order, it was not aware of the Forbearance Agreement between Comerica and YMT. (*Id.* ¶ 36.) On November 12, 2009, Koyo submitted a down payment to YMT in the amount of $47,926.35 for the Control Box and Fixture. (*Id.* ¶ 43.) Koyo alleges that after it submitted the down payment to YMT, Koyo and YMT agreed that Koyo would not pay the outstanding balance of $111, 828.15 until YMT completed the Control Box and Fixture. (*Id.* ¶ 44.) On December 17 and 18, 2009, respectively, YMT sent Koyo two invoices for payment of the outstanding balance. (*Id.* ¶ 45.) Shortly thereafter, Koyo issued a check in the amount of the outstanding balance and inadverently mailed the check to YMT instead of withholding payment as the parties had agreed. (*Id.* ¶¶ 47–50.) Koyo maintains that it did not intend to pay for the outstanding balance at this time as the Control Box and Fixture had yet to be completed. (*Id.* ¶ 49.) It further alleges that YMT has acknowledged that Koyo's payment of the Outstanding Balance was by mistake, and notified English of this error. (*Id.* ¶¶ 52–53.)

C. Koyo's Efforts to Recover its Payment for the Outstanding Balance

According to Koyo, Comerica and Amherst have refused to return to Koyo the check for the outstanding balance. (*Id.* ¶ 54.) Moreover, Koyo alleges that YMT and Comerica have not applied the funds towards the $122,000 that is currently owed to subcontractors working on the Control Box and Fixture. (*Id.* ¶ 56.) As a result of their failure to remit the funds to the subcontractors, the subcontractors are refusing to finish the Control Box and Fixture. (*Id.* ¶ 62.)

On February 26, 2010, Koyo sent a demand letter to Comerica demanding that Comerica return the payments made by Koyo to YMT for the purchase of the Control Box and Fixture. (*Id.* ¶ 63.) In the alternative, Koyo demanded that Comerica fulfill the purchase orders by paying the subcontractors the approximately $122,000.00 required to complete the Control Box and Fixture. (*Id.*) Koyo alleges that Comerica has refused to comply with either demand. (*Id.* ¶¶ 65–66.) Koyo alleges that Comerica's retention of its funds has assisted YMT in reducing its debt to Comerica by $159,754.50. (*Id.* ¶ 72.)

***3** On November 9, 2010, Koyo filed the instant suit, asserting ten grounds for relief: (1) breach of contract against YMT, *id.* ¶¶ 85–89; (2) conversion against Comerica, *id.* ¶¶ 90–94; (3) unjust enrichment against YMT and Comerica, *id.* ¶¶ 95–98; (4) promissory estoppel against YMT, *id.* ¶¶

99–104; (5) fraudulent concealment against YMT, Comerica, Amherst, English, and the Guarantors, *id.* ¶¶ 105–19; (6) fraud against YMT and the Guarantors, *id.* ¶¶ 120–30; (7) fraudulent inducement to contract against YMT and the Guarantors, *id.* ¶¶ 131–40; (8) tortious interference with contract against Comerica, Amherst, and English, *id.* ¶¶ 141–48; (9) civil conspiracy against YMT, Comerica, Amherst, English, and the Guarantors, *id.* ¶¶ 149–56; and (10) aiding and abetting against Comerica, Amherst, and English, *id.* ¶¶ 157–64. Koyo requests monetary damages, attorney fees and costs, prejudgment interest and post judgment interest, and any other form of relief necessary to remedy its injury. (*Id.* 21–23, ¶¶ 1–11.)

On December 15, 2010, Defendant Comerica filed its Motion to Dismiss. (ECF No. 18.) Comerica moves to dismiss all Counts asserted against it pursuant to Fed.R.Civ.P. 12(b)(6), 9(b). Koyo filed its Opposition to Comerica's Motion to Dismiss on January 28, 2011. (ECF No. 28.) Comerica has since filed its Reply in Support of its Motion. (ECF No. 35.) For the following reasons, the court grants in part and denies in part Comerica's Motion to Dismiss.

II. STANDARD OF REVIEW

In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, the court must determine the legal sufficiency of the plaintiff's claim. *See Mayer v. Mulod,* 988 F.2d 635, 638 (6th Cir.1993). *See also, Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (clarifying the legal standard for a Rule 12(b)(6) motion to dismiss); *Ashcroft v. Iqbal,* —— U.S. ——, ——– – ———, 129 S.Ct. 1937, 1949–50, 173 L.Ed.2d 868 (2009) (same).

In making this determination, a court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations within as true, and determine whether the complaint possesses "enough facts to state a claim to relief that is plausible on its face." *Twombly,* 550 U.S. at 570. The complaint must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 129 S.Ct. at 1949. The plaintiff's obligation to provide the grounds for relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555. A complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the Complaint are true." *Id.*

For this analysis, a court may look beyond the allegations contained in the complaint to exhibits attached to or otherwise incorporated in the complaint, all without converting a motion to dismiss to a motion for summary judgment. Fed.R.Civ.P. 10(c); *Weiner v. Klais & Co.,* 108 F.3d 86, 89 (6th Cir.1997). Ultimately, this determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1950.

***4** Pursuant to Fed.R.Civ.P. 9(b), "the party alleging fraudulent concealment must plead the circumstances giving rise to it with particularity." *Dayco Corp. v. Goodyear Tire & Rubber Co.,* 523 F.2d 389, 394 (6th Cir.1975). Under that heightened standard, "a plaintiff, at a minimum, must allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *U.S. ex rel. Bledsoe v. Comm. Health Sys., Inc.,* 501 F.3d 493, 504 (6th Cir.2007) (quoting *Coffey v. Foamex L.P.,* 2 F.3d 157, 161–62 (6th Cir.1993)).

III. LEGAL ANALYSIS

A. Count II—Conversion against Comerica

Under Ohio law, conversion is the "wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights." *Joyce v. General Motors Corp.,* 49 Ohio

St.3d 93, 551 N.E.2d 172, 175 (Ohio 1990). A plaintiff asserting a claim for conversion must sufficiently plead the following elements: (1) plaintiff's ownership or right to possession of the property at the time of conversion; (2) defendant's conversion by a wrongful act or disposition of the plaintiff's property rights; and (3) damages. *See Dice v. White Family Cos.*, 173 Ohio App.3d 472, 878 N.E.2d 1105, 1109 (Ohio Ct.App.2007). Where conversion is premised on the unlawful retention of property, the plaintiff must sufficiently allege that (1) the plaintiff demanded the return of the property from the possessor after the possessor exerted dominion over the property; and (2) that the possessor refused to deliver the property to its rightful owner. *Id.* The object of the demand is "to turn an otherwise lawful possession into an unlawful one, by reason of a refusal to comply with it, and thus to supply evidence of a conversion." *Fid. & Deposit Co. of Md. v. Farmers & Citizens Bank of Lancaster,* 72 Ohio App. 432, 52 N.E.2d 549, 550 (Ohio Ct.App.1943) (quoting *Pease v. Smith,* 61 N.Y. 477 (N.Y.1875). Further, where a claim for conversion is premised on the conversion of money, "the action will only lie if identification is possible and there is an obligation to deliver the specific money in question." *Dice,* 878 N.E.2d at 1109 (internal quotations omitted).

In its Motion to Dismiss, Comerica contends that Koyo's allegations fail to state a claim for three separate reasons. First, Comerica argues that a plaintiff who has parted with ownership of property cannot subsequently bring an action for conversion unless the plaintiff was induced by fraud to relinquish said property, and in this case, Comerica's conduct was not wrongful or fraudulent because it did not have a duty to disclose YMT's financial condition to Koyo. (Def.'s Mem. in Supp. 8, ECF No. 18.) Second, Comerica contends that its retention of Koyo's payments for the Control Box and Fixture was not wrongful as a matter of law in light of Comerica's contract with YMT. (*Id.* 9, 878 N.E.2d 1105.) Comerica argues that Koyo in effect conceded this point in its Complaint by incorporating the agreement between YMT and Comerica. (*Id.* (citing Compl. ¶ 16).) Finally, Comerica maintains that because Koyo's claim is based on the conversion of money, the law requires that the money be capable of identification. (*Id.* 9–10, 878 N.E.2d 1105.) Comerica asserts that Koyo cannot identify any specific cash that is the subject of its conversion claim, but rather refers only to a sum certain amount that it paid to YMT. (*Id.* 10, 878 N.E.2d 1105.) [FN2]

> FN2. The court notes that in its Reply Memorandum in Support of its Motion to Dismiss (ECF No. 35), Defendant also raised an objection pursuant to Uniform Commercial Code, arguing that Comerica became a holder in due course pursuant to U.C.C. 3–302. In fairness to the Plaintiff, however, the court does not consider this argument as Plaintiff did not have an opportunity to respond.

***5** As a preliminary matter, the court finds that Koyo, by incorporating the Forbearance Agreement between Comerica and YMT into its Complaint, did not concede that Comerica was legally entitled to the YMT payment at issue in this case. That Comerica was entitled to cash inflows pursuant to its Forbearance Agreement does not mean that it was entitled to funds that Koyo claims belonged to it in light of YMT's failure to perform on its contract with Koyo. The conditions of the Forbearance Agreement between YMT and Comerica are a separate matter from Comerica's conduct with respect to Koyo.

However, the court agrees with Defendant that Plaintiff's conversion claim fails because it rests on allegations that Comerica owes Plaintiff a sum certain, and not that "the money involved is 'earmarked' or is specific money capable of identification, e.g., money in a bag, coins or notes that have been entrusted to the defendant's care, or funds that have otherwise been sequestered, and where there is an obligation to keep intact and deliver this specific money." *Haul Trans. of Va., Inc.*

v. Morgan, No. CA 14859, 1995 WL 328995, *4 (Ohio Ct.App. 2 Dist. June 2, 1995) (quoting *Gray v. Liberty Nat. Life Ins. Co.,* 623 So.2d 1156, 1160 (Ala.1993); *see also NPF IV, Inc. v. Transitional Health Services,* 922 F.Supp. 77, 82 (S.D.Ohio 1996) ("An action for conversion also requires that the defendant have an obligation to deliver specific money as opposed to merely a certain sum of money."). Plaintiff argues that it can maintain its claim because the claim is "for the specifically identifiable Payments that Comerica converted, which Payments Koyo specifically earmarked for the Control Box when it transmitted the Payments to YMT." (Pl.'s Mem. in Opp'n 14, ECF No. 28.) Plaintiff's argument, however, misses the mark—as between Comerica and Koyo, Plaintiff has failed to sufficiently allege that Comerica had "an obligation," through contract or in a fiduciary capacity, "to deliver the *specific money* in question." *Dice,* 878 N.E.2d at 1109 (emphasis). Rather, Plaintiff's allegations suggest that it would be made whole by mere payment of a sum certain—"damages in the amount of $159,754.50." (Am.Compl.¶ 94) Consequently, the court dismisses Plaintiff's conversion claim.

B. Count III—Unjust Enrichment against YMT and Comerica

To prevail on a claim for unjust enrichment claim, Koyo must show that: (1) it conferred a benefit to Comerica; (2) Comerica knew of such benefit; and (3) Comerica unjustly retained the benefit without compensating Koyo. *Res. Title Agency v. Morreale Real Estate Servs.,* 314 F.Supp.2d 763, 771 (N.D.Ohio 2004) (citing *Hambleton v. R.G. Barry Corp.,* 12 Ohio St.3d 179, 465 N.E.2d 1298 (1984)); *see also, Johnson v. Microsoft Corp.,* 106 Ohio St.3d 278, 834 N.E.2d 791, 799 (Ohio 2005) (A plaintiff must show that the defendant possesses money or benefits which in justice and equity belong to another.).

Comerica contends that Koyo's unjust enrichment claim fails because under Ohio law, the benefit conferred to the defendant must be obtained by fraud, misrepresentation or bad faith, and in this case, the payment was not induced by such conduct on the part of Comerica. (Def.'s Mem. in Supp. 10–11.) Comerica argues that fraud, misrepresentation and bad faith are absent here because it had no legal duty to disclose YMT's financial condition to Koyo. (*Id.*) For its first argument, Comerica relies on *Firstar Bank, N.A. v. Prestige Motors, Inc.,* N. H–04–037, 2005 WL 2049174 (Ohio Ct.App. Aug. 26, 2005) wherein the Ohio Court of Appeals noted that the "conferral of the benefit must be the product of fraud, misrepresentation or bad faith by the party accepting and retaining the benefit." *Id.* at *2. In its Opposition, Koyo asserts that, under Ohio law, Comerica need not have acted improperly, "as unjust enrichment also results from a failure to make restitution where it is equitable to do so." (Pl.'s Memo in Opp'n 16 (quoting *Resource Title Agency, Inc. v. Morreale Real Estate Services, Inc.,* 314 F.Supp.2d 763, 772 (N.D.Ohio 2004)). Comerica counters that Plaintiff's theory of recovery has been rejected by the Ohio Supreme Court, in *Cosby v. Cosby,* 96 Ohio St.3d 228, 773 N.E.2d 516 (Ohio 2002), wherein the court overruled a court of appeals' decision imposing a constructive trust upon the State Teachers Retirement System ("STRS") survivor benefits of a surviving spouse in favor of a former spouse who claimed entitlement based on an award of retirement benefits in a divorce decree. *Id.* at 517–18.

***6** As an initial matter, the Ohio Supreme Court's decision in *Cosby* is inapposite. That case dealt with a conflict between a statutory mandate regarding the distribution of survivor benefits and the equitable remedy of constructive trust. The Court had no occasion to address the elements of a claim for an unjust enrichment claim. In this case, Defendants erroneously reads a fourth element into Ohio's standard for unjust enrichment, arguing that Plaintiff must also sufficiently allege fraud, misrepresentation or bad faith. While Defendant is correct that some Ohio Courts of Appeals have required litigants to establish some form of improper conduct as the basis for their unjust enrichment claim

(Def.'s Reply 6, ECF No. 35), there is sufficient contrary authority such that the court does not predict that the Ohio Supreme Court would require this additional factor. *See, e.g., Dixon v. Smith,* 119 Ohio App.3d 308, 695 N.E.2d 284, 290 (Ohio Ct.App.1997) ("The doctrine of unjust enrichment has also been applied where one party has been enriched at the expense of another due to a mistake either of law or fact."); *Firestone Tire & Rubber Co. v. Cent. Nat'l Bank of Cleveland,* 159 Ohio St. 423, 112 N.E.2d 636 (1953).

As the Sixth Circuit has noted, "Ohio law contains no requirement that a party have acted improperly for an action based upon quasi-contract to succeed.... Passive retention of a benefit where such retention is 'unconscionable' is enough to trigger liability." *F.D.I.C. v. Jeff Miller Stables,* 573 F.3d 289, 295 (6th Cir.2009); *see also Reisenfeld & Co. v. Network Group, Inc.,* 277 F.3d 856, 860–62 (6th Cir.2002).

Accepting all the factual allegations as true, Koyo's Complaint sufficiently alleges a claim for unjust enrichment. Koyo alleges that Comerica has benefitted from "Koyo's inadvertent payment ... because it received $111,828.15, which Koyo was not obligated to pay to either Comerica or YMT," (Am.Compl.¶ 60); that Koyo informed Comerica of the inadvertent payment and demanded its return (*id.* ¶ 63–64); that Comerica refused to comply with the demand (*id.* at 65–66); and that as a result the subcontractors are refusing to finish work on the Control Box and Fixture. (*Id.* ¶ 62.) Koyo alleges that it suffered damages in the amount of $159,754.50 as "a direct and proximate result" of Comerica's conduct. (*Id.* ¶ 98.) Koyo alleges that under these circumstances, "Comerica's retention of this benefit would be unjust and inequitable." (*Id.* ¶ 97.) While the court does not decide whether or not Comerica's conduct was unjust under these circumstances, the court finds that Plaintiff has sufficiently plead a claim for unjust enrichment, and thus Comerica's Motion to Dismiss this claim is denied.[FN3]

FN3. After Comerica filed its Motion to Dismiss Koyo's Complaint (ECF No. 18) and Reply in support of its Motion (ECF No. 35), Comerica renewed arguments in favor of dismissing Koyo's unjust enrichment claim in its Motion to Dismiss Yamamoto Defendants' Cross Claim (ECF No. 56). The court takes note of these arguments, but, as Comerica concedes, finds that these arguments have no bearing on the Motion addressed in this Order. Comerica can raise these objections at the summary judgment stage.

C. Count V—Fraudulent Concealment Against Comerica

For its fraudulent concealment claim, Koyo must show: (a) a representation, or where there is a duty to disclose, concealment of a fact; (b) which is material to the transaction at hand; (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (d) with the intent of misleading another into relying upon it; (e) justifiable reliance upon the representation or concealment; and (f) a resulting injury proximately caused by the reliance. *Cohen v. Lamko, Inc.,* 10 Ohio St.3d 167, 462 N.E.2d 407, 409 (Ohio 1984). A party can be liable not only for its affirmative misrepresentations, but also for any material omissions if it has a duty to speak. *Schulman v. Wolske & Blue Co., L.P.A.,* 125 Ohio App.3d 365, 708 N.E.2d 753, 758 (Ohio Ct.App.1998). A duty to disclose arises only in limited circumstances, such as where there is relationship in which "one party imposes confidence in the other because of that person's position, and the other party knows of this confidence." *Central States Stamping Co. v. Terminal Equip. Co., Inc.,* 727 F.2d 1405, 1409 (6th Cir.1984) (interpreting Ohio law); *see also General Acquisition, Inc. v. Gencorp, Inc.,* 766 F.Supp. 1460, 1480 (N.D.Ohio 1990).

***7** In this case, Comerica argues that Plaintiff's fraudulent concealment claim fails because "Koyo

has not alleged any set of facts, such as a request for information regarding YMT's financial condition from Comerica or any relationship with Comerica, to establish a qualifying circumstance that might give rise to a duty to disclose YMT's financial condition to YMT's customer Koyo." (Def.'s Mem. in Supp. 7.) Further, Comerica argues that because Koyo fails to meet general pleading standards, it also fails to meet the heightened standard applicable to fraud claims pursuant to Rule 9(b). (*Id.*)

The court agrees with Comerica. Plaintiff cites *Cent. States Stamping Co. v. Lake Cnty. Nat'l Bank,* 727 F.2d 1405 (6th Cir.1984), for support, but that case is distinguishable from the instant case. In that case, Central States Stamping Company ("Central States") contracted with Terminal Equipment Company, Inc. ("Terminal") for the purchase of a "slitting line" machine. *Id.* at 1406. Before making the purchase, Central States asked Terminal about its financial stability and Terminal replied that it was working closely with a Lake County National Bank ("Bank") and that Central States should contact the Bank for additional information. *Id.* Central States contacted the Bank to seek assurances about Terminal's financial stability. *Id.* The Bank, in turn, made "positive" representations to Central States about Terminal's financial condition. *Id.* at 1407. Central States later discovered that Terminal was heavily indebted to the Bank, and that the Bank had assumed a supervisory role over Terminal's daily operations. *Id.* at 1406. Central States sued the Bank for fraudulent misrepresentation. *Id.* at 1408. The court addressed whether the Bank owed Central States a duty to disclose Terminal's insolvency, and found that it did so given its positive representations regarding Terminal's financial condition when it was aware of its true condition. *Id.* at 1409. In this case, Koyo does not allege any facts to suggest that it was in a relationship of confidence with Comerica. Koyo does allege that it was in a relationship of trust and confidence with YMT and the Guarantors. (Am.Compl.¶ 107.) Further, Koyo does not allege that it requested information from Comerica regarding YMT's financial conditions, nor does it allege that it had any communication with Comerica during its transaction with YMT. Koyo argues that, under the Forbearance Agreement, Comerica was not an "arms-length" lender to YMT, but "assumed all control over YMT's business and operations, including directing its relationships with customers." (Pl.'s Mem. in Opp'n 8.) In *Central States,* however, it was not the supervisory role over the debtor-manufacturer that the court found dispositive, but rather the fact that the Bank "undertook to advise [plaintiff] with respect to Terminal's financial condition," which in turned triggered the "duty to disclose information ... which would reasonably be considered material to the decision ... [plaintiff] was in the process of making." *Central States,* 727 F.2d at 1409.

***8** Koyo also relies on *Escue v. Sequent, Inc.,* 2:09–cv–765, 2010 WL 3365933 (S.D.Ohio Aug.24, 2010), a case in which the court denied corporate directors' motion to dismiss plaintiff shareholder's fraudulent inducement claim. Koyo's reliance on *Escue,* however, is misplaced. In *Escue,* a sole shareholder of an acquired corporation brought an action for fraudulent inducement against the directors of the acquiring corporation because of false statements and material omissions in the merger agreement. *Id.* at *1–*3. The defendants argued that no misrepresentations were made because they were not involved in the merger negotiations. *Id.* at *7. The court rejected this argument, finding that as officers of a closely held corporation, "the defendants presumably [had] a greater degree of knowledge and control over Sequent's operations than would the outside directors of a large corporation" when they ratified the agreement. *Id.* at * 8. In this case, there are no factual allegations that would support the inference that Comerica ratified the purchase agreement between Koyo and YMT, or that Comerica made any representation to Koyo during the course of Koyo's transaction with YMT. Consequently, the court dismisses Koyo's fraudulent concealment claim against Comerica.

D. Count VIII—Tortious Interference with Contract

For its tortious-interference-with-contract claim, Koyo must show: (1) the existence of a contract or employment relationship; (2) the defendant's knowledge of the contract or employment relationship; (3) the defendant's intentional procurement of the breach of the contract of termination of the employment relationship; (4) lack of justification; and (5) resulting damages. *Vistein v. Amer. Registry of Radiologic Tech.,* 342 F. App'x 113, 129 (citing *Kenty v. Transamerica Premium Ins. Co.,* 72 Ohio St.3d 415, 650 N.E.2d 863 (1995)). The Ohio Supreme Court has enumerated factors that a court should consider in determining whether the alleged wrongdoer's actions were justified or privileged:

> (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties.

Fred Siegel Co. v. Arter & Hadden, 85 Ohio St.3d 171, 707 N.E.2d 853, 860 (Ohio 1999) (citing RESTATEMENT (SECOND) OF TORTS § 767 (1979)). Under Ohio law, plaintiff has the burden of proving lack of privilege. *Super Sulky, Inc. v. U.S. Trotting Ass'n,* 174 F.3d 733, 742 (6th Cir.1999).

Comerica argues that Koyo's claim fails as a matter of law because it is justified, as a creditor, to interfere with Koyo's contract with YMT. (Def.'s Mem. in Supp. 11–13.) Comerica contends that the law affords a creditor, like itself, a privilege to interfere with its debtor's contracts to further its legitimate business interests. (*Id.*); *see also Canderm Pharmacal, Ltd. v. Elder Pharm., Inc.,* 862 F.2d 597, 601 (6th Cir.1998). Koyo responds that Comerica is not entitled to justification for its interference because Comerica's conduct was of a "knowing and deceitful nature" and that Comerica and the other Defendants worked together to take Koyo's payments "with full knowledge that those payments were for the furtherance of—and indeed critical to—Koyo's contract with YMT. (Pl.'s Mem. in Opp'n 19.)

***9** While the court agrees with Defendants that the law affords the creditor a privilege to interfere with a contract in furtherance of its legitimate business interest, this privilege is not absolute. Ohio law affords a privilege where the party is "in good faith ... asserting a legally protected interest of his own, which he believes will be impaired or destroyed by the performance of the contract." *Pearse v. McDonald's Sys. of Ohio, Inc.,* 47 Ohio App.2d 20, 351 N.E.2d 788, 791 (Ohio Ct.App.1975). As such, the question of privilege is a context specific inquiry. *Brookeside Ambulance v. Walker Ambulance Serv.,* 112 Ohio App.3d 150, 678 N.E.2d 248, 252 (Ohio Ct.App.1996). Thus, the fact that Comerica could collect certain payments from YMT pursuant to the Forbearance Agreement is not dispositive at this juncture. In its Complaint, Koyo alleges that it apprised Comerica of Koyo's contract with YMT and the arrangement the parties had agreed to regarding payment. (Am.Compl.¶ 63.) Further, it apprised Comerica that its failure to remit Koyo's payments to the subcontractors affected the completion of the Control Box and Fixture. (*Id.* ¶ 64, 678 N.E.2d 248.) Koyo further alleges that Comerica refused to cooperate with its demands despite having apprised Comerica of Koyo's interest in the funds. (*Id.* ¶¶ 65–66.) Koyo alleges that even though YMT had defaulted on its Note, Comerica "loaned money to YMT so that YMT would remain in operation for the sole purpose of collecting money from customers to pay its debt to Comerica." (*Id.* ¶ 28, 678 N.E.2d 248.) Taken together, the court finds these pleadings sufficiently allege a lack of privilege or justification and allow the court to draw a reasonable inference that Comerica's conduct in refusing to return funds Koyo claimed pursuant to a contract with YMT was improper. Thus, the court denies Defendant's Motion to Dismiss

Koyo's tortious interference claim.

E. Count IX—Civil Conspiracy

A civil conspiracy is "an agreement between two or more persons to injure another person by unlawful action." *Moore v. City of Paducah,* 890 F.2d 831, 834 (6th Cir.1989). In order to establish this claim, Koyo must allege: (1) a malicious combination; (2) of two or more persons; (3) injury to person or property; and (4) existence of an unlawful act independent from the actual conspiracy. *Ohio Bureau of Workers' Comp. v. MDL Active Duration Fund, Ltd.,* 476 F.Supp.2d 809, 825 (S.D.Ohio 2007) (citing *Kenty v. Transamerica Premium Ins. Co.,* 72 Ohio St.3d 415, 650 N.E.2d 863 (Ohio 1995). The parties alleged to have conspired must act with malice such that they committed the wrongful act purposely, "without reasonable or lawful excuse." *Williams v. Aetna Fin. Co.,* 83 Ohio St.3d 464, 700 N.E.2d 859, 868 (Ohio 1998) (internal quotation marks omitted). Koyo does not have to show that Defendants expressly agreed to the conspiracy, but must allege that there existed "a common understanding or design, even if tacit, to commit an unlawful act." *Gosden v. Louis,* 116 Ohio App.3d 195, 687 N.E.2d 481, 496 (Ohio Ct.App.1996) (internal quotation marks omitted). To survive a motion to dismiss, a conspiracy claim "must be pled with some degree of specificity and [ ] vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim." *Rosy Blue, NV v. Lane* 767 F.Supp.2d 860, 868 (S.D.Ohio 2011) (quoting *Gutierrez v. Lynch,* 826 F.2d 1534, 1538–39 (6th Cir.1987)). Comerica contends that Koyo has not sufficiently pled two of the four elements for civil conspiracy—malicious combination and unlawful act independent from the actual conspiracy. (Def.'s Mem. in Supp. 13–14.) While the court held above that Koyo's tortious interference with contract claim survives Comerica's Motion to Dismiss, and Koyo asserts this claim as an underlying unlawful act for its conspiracy claim (Pl.'s Mem. in Opp'n 20), the court finds that Koyo nevertheless fails to state a claim for civil conspiracy because it has not sufficiently alleged factual matter to support a conspiracy claim. Koyo has failed to make any specific allegations against Comerica that, if true, would show that Comerica engaged in a meeting, discussion or agreement to join in alleged wrongful conduct or a "malicious combination" with the other Defendants. Rather, Koyo's allegations concerning a conspiracy among the Defendants rest on mere "labels and conclusions." *Twombly,* 550 U.S. at 555. Consequently, this court grants Comerica's Motion to Dismiss Koyo's civil conspiracy claim.

F. Count X—Aiding and Abetting

***10** Under its tenth claim for relief, Koyo alleges that Comerica, along with Amherst and English, "assisted YMT in breaching its obligations and duties to Koyo by propping up YMT to make it appear that it was a solvent entity that was fulfilling orders from its customers, when in fact it was not." (Compl.¶ 151.) Comerica argues that this claim can be dismissed on two separate bases. First, Comerica argues that Ohio law does not recognize a claim for aiding and abetting fraud.[FN4] (Mem. in Supp. Mot. to Dismiss 14, ECF No. 18.) The Sixth Circuit has noted the uncertainty as to whether Ohio law recognizes a claim for aiding and abetting common law fraud. *See Pavlovich v. Nat'l City Bank,* 435 F.3d 560, 570 (6th Cir.2006) ("It is unclear whether Ohio recognizes a common law cause of action for aiding and abetting tortious conduct."); *but see Aetna Cas. & Sur. Co. v. Leahey Const. Co.,* 219 F.3d 519, 533 (6th Cir.2000) ("[W]e conclude that the Supreme Court of Ohio would recognize aiding and abetting liability if squarely faced with the issue.") Second, Comerica argues that even if aiding and abetting were a valid cause of action, Koyo's claim fails because its allegations arise from a breach of contract duties by YMT, and the underlying act must be a tort. (Def.'s Mem. 14.)

> FN4. Koyo labels Count X as simply "aiding and abetting" (see Compl. p. 20), although this court reads Count X as a claim for aiding and abetting in a civil tort. Courts have used various labels for this

claim including, "aiding and abetting fraud," see *Aetna,* 219 F.3d 519, "aiding and abetting for tortious conduct," *Pavlovich,* 435 F.3d 360. The court will use these labels interchangeably.

In *Pavlovich,* the Sixth Circuit affirmed this court's grant of the defendant's motion for summary judgment on all claims including the plaintiff's claim for aiding and abetting tortious conduct. 435 F.3d at 570–571. The *Pavlovich* court acknowledged the unsettled question of whether there is a civil aiding and abetting cause of action under Ohio law. *Id.* at 571. However, the Pavlovich court did not resolve this uncertainty. Instead, the court concluded that even if Ohio law recognized a civil aiding-and-abetting claim, plaintiff had not proffered evidence to show a triable issue regarding the elements of the claim. *Id.* at 570–71 (quoting *Pavlovich v. Nat'l City Bank,* 342 F.Supp.2d 718, 735–36 (N.D.Ohio 2004)). In making this determination, the Court applied the elements of § 876(b) of the Second Restatement of Torts, which "provides the basis for 'modern application of civil aiding and abetting' and requires two elements: '(1) knowledge that the primary party's conduct is a breach of duty and (2) substantial assistance or encouragement to the primary party in carrying out the tortious act.' " *Id.* at 570 (quoting *Aetna,* 219 F.3d at 532–33).

Assuming *arguendo* that aiding and abetting is a valid cause of action under Ohio law, Koyo's claim nevertheless fails because Koyo has failed to adequately allege that Comerica has provided substantial assistance or encouragement to YMT in furtherance of a tortious act. While Koyo asserted a claim of fraudulent concealment against YMT, which may serve as the principal's tortious act for the purposes of aiding and abetting, Koyo has failed to sufficiently allege active participation or knowing provision of substantial assistance by Comerica in furtherance of YMT's fraud. In particular, Koyo's Complaint is devoid of factual allegations from which the court can reasonably infer that Comerica was aware of YMT's allegedly fraudulent conduct with respect to Koyo and provided YMT with assistance and encouragement to perpetrate the alleged fraud against Koyo. Koyo pleads that Comerica was "aware of YMT's obligations and duties to Koyo" and that Comerica, along with Amherst and English, "assisted YMT in breaching its obligations and duties to Koyo." (Am.Compl.¶¶ 158–161.) As the Supreme Court held in *Twombly,* however, a "recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555. While Koyo specifically pleads that "Comerica loaned money to YMT so that YMT would remain in operation for the sole purpose of collecting money from customers to pay its debt to Comerica" (Am.Compl.¶ 28), the Complaint is devoid of factual allegations concerning specific conduct by Comerica in relation to specific transactions between YMT and its customers. For example, there are no factual allegations that would permit the court to infer that Comerica ratified YMT's representations to Koyo regarding their contract for the Control Box and Fixture. Accordingly, this court grants Comerica's Motion to Dismiss Koyo's aiding and abetting claim.

IV. CONCLUSION

***11** For the foregoing reasons, the court grants in part and denies in part Defendant Comerica Bank's Motion to Dismiss. (ECF No. 18.) The court denies Comerica's Motion with respect to Plaintiff's claims for unjust enrichment (Count III) and tortious interference with contract (Count VIII), and grants it with respect to Plaintiff's claims for conversion (Count II), fraudulent concealment (Count V), civil conspiracy (Count IX), and aiding and abetting (Count X).

IT IS SO ORDERED.

N.D.Ohio,2011.
Koyo Corp. of U.S.A. v. Comerica Bank
Not Reported in F.Supp.2d, 2011 WL 4540957 (N.D.Ohio)

END OF DOCUMENT

Exhibit K

H

Only the Westlaw citation is currently available.

United States District Court,
S.D. Ohio,
Western Division.
Kimberly SPEARS, et al., Plaintiffs,
v.
CHRYSLER, LLC, et al., Defendants.

No. 3:08CV331.
Feb. 8, 2011.

Anne M. Valentine, Gerald Scott Leeseberg, Leeseberg & Valentine, Kenneth M. Suggs, Janet Jenner & Suggs LLC, Columbus, OH, Joel M. Rubenstein, Steven J. German, German Rubenstein LLP, New York, NY, Robert K. Jenner, Howard A. Janet, Janet & Jenner LLC, Baltimore, MD, for Plaintiffs.

Daniel E. Izenson, Gregory Michael Utter, Daniel E Izenson, Cincinnati, OH, John W. Rogers, Kathy Wisniewski, John W. Rogers, Kathy Wisniewski, Thompson Coburn LLP, St. Louis, MO, Caroline Gentry, Porter Wright Morris & Arthur, Dayton, OH, James A. King, Columbus, OH, Jill Marr Przybylski, Khalilah Vonn Spencer, Nicholas B. Gorga, Norman C. Ankers, Robert M. Jackson, Honigman, Miller, Schwartz and Cohn LLP, Detroit, MI, for Defendants.

DECISION AND ENTRY OVERRULING, IN PART, AND SUSTAINING, IN PART, DEFENDANTS' MOTION TO DISMISS OR STAY (DOC. # 28); ADOPTING, IN PART, AND REJECTING, IN PART, MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS (DOC. # 5) AND OVERRULING, IN PART, AND SUSTAINING, IN PART,DEFENDANTS' OBJECTIONGS THERETO (DOC. # 53); INSTRUCTIONGS TO PLAINTIFFS

WALTER HERBERT RICE, District Judge.

***1** The Plaintiffs [FN1] are residents and property owners in Dayton, Ohio, who live near an industrial facility that was allegedly owned, operated, or formerly operated by the following named Defendants: Chrysler, LLC ("Chrysler"); Behr Dayton Thermal Products, LLC and Behr America, Inc. (Behr Dayton Thermal Products, LLC and Behr America, Inc. referred to, collectively, as "Behr"); and Behr Dayton Thermal Plant, LLC. Doc. # 3 (Am.Compl.). The Plaintiffs bring suit against the Defendants for alleged contamination of their property and persons "with toxic, carcinogenic and otherwise ultra hazardous chemicals." *Id.* ¶ 1. The Plaintiffs bring this litigation under Ohio law, [FN2] seeking certification of a class of Plaintiffs and alleging various state law claims, to wit: trespass (Count I); private nuisance (Count II); unjust enrichment (Count III); strict liability (Count IV); negligence (Count V); negligence *per se* (Count VI); medical monitoring (Count VII); battery (Count VIII); intentional fraudulent concealment (Count IX); negligent fraudulent concealment (Count X); negligent misrepresentation (Count XI); civil conspiracy (Count XII); and punitive/exemplary damages (Count XIII). *Id.* In their prayer for relief, the Plaintiffs ask to be certified as a class, that the Defendants finance various costs associated with medical monitoring, and that judgment be entered in favor of the class for costs incurred in medical monitoring, loss of property value, attorneys' fees and costs. *Id.* at 36.

FN1. The named Plaintiffs are Kimberly Spears, Kirk Hubert and Angela Norman, individually and as mother and natural guardian of Tanisha Norman, a minor. Doc. # 3 (Am.Compl.).

FN2. The Magistrate Judge noted that the Amended Complaint does not raise any federal claims, but that jurisdiction seems to be vested in this Court under the provisions of 28 U.S.C. § 1332(d)(2). Doc. # 45 at 3 n. 2. That Code Section provides that a district court has original jurisdiction of any civil action in which the matter in con-

troversy exceeds the sum of $ 5,000,000, and (among other alternatives) is a class action in which any member of a class of plaintiffs is a citizen of a state different from any defendant. 28 U.S.C. § 1332(d)(2)(A). Although the Amended Complaint does not specify that the matter in controversy exceeds the sum of $5,000,000, the Defendants do not object to this jurisdictional premise and, thus, the Court will proceed on the assumption that it has jurisdiction under that Code Section. *See also* 28 U.S.C. § 1332(a)(1) (noting prerequisites of traditional diversity jurisdiction); Doc. # 3 (Am.Compl.) at 5–6 (indicating that named Plaintiffs are citizens of Ohio and Defendants are citizens of Delaware; the filed copy of the Amended Complaint is actually missing page 5, which gives details of named Plaintiffs, but the original Complaint (Doc. # 2) indicates that all named Plaintiffs are Ohio citizens). At the end of this Opinion, the Court has instructed the Plaintiffs to file a Second Amended Complaint, in order to correct the filing error with regard to the omitted page 5, as well as to address other noted deficiencies.

Presently before the Court is the Defendants' Motion to Dismiss or Stay (Doc. # 28), as well as the Magistrate Judge's Report and Recommendations (Doc. # 45) and the Defendants' objections thereto (Doc. # 53).

Initially, the Court notes that the Defendants request that all claims against Defendant "Behr Dayton Thermal Plant, LLC" be dismissed, given that the same is not a legal entity. Doc. # 28 at 1 n. 1. The Plaintiffs do not dispute this assertion and, thus, the Court SUSTAINS the Defendants' Motion to Dismiss (Doc. # 28), as it pertains to all claims pending against Defendant Behr Dayton Thermal-Plant, LLC.

In their Motion, the Defendants also assert the following: (1) that the Amended Complaint must be dismissed or stayed, under the doctrine of primary jurisdiction (with regard to the on-going investigation and remediation/mitigation by the United States Environmental Protection Agency and the Ohio Environmental Protection Agency); (2) that certain Counts of the Amended Complaint (Counts III, VI–XIII) be dismissed, under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted; and (3) that certain Counts of the Amended Complaint (Counts IX–X) be dismissed, under Rule 9(b), for failure to plead fraud with particularity. Doc. # 28. With the exception of the claims for medical monitoring and punitive/exemplary damages (Counts VII and XIII), the Magistrate Judge disagreed with the Defendants, on all contentions, finding that the case should not be dismissed or stayed under the doctrine of primary jurisdiction, that the Amended Complaint sufficiently stated claims, for all other contested causes of action, and that the fraud claims were pled with sufficient particularity. Doc. # 45. The Defendants object to the Magistrate Judge's Report and Recommendations, with regard to the conclusions pertaining to the doctrine of primary jurisdiction and as to whether Counts IX–XII were sufficiently pled. Doc. # 53.

***2** The Court will begin its analysis with a review of the pertinent facts and the legal standards that guide its decisions herein. It will then turn to a consideration of the present Motion, first looking at the doctrine of primary jurisdiction and then at the claims challenged as insufficiently pled.

I. *Facts*

The Plaintiffs reside on Taylor Street in Dayton, Ohio. Doc. # 2 (Compl.) ¶¶ 13–16; Doc. # 3 (Am.Compl.) ¶ 16. Until 2002, Chrysler owned and operated an industrial facility at 1600 Webster Street in Dayton, Ohio—in the vicinity of Taylor Street. Doc. # 3 ¶¶ 21–22. Since 2002, Behr has owned and operated the facility. *Id.* According to the Plaintiffs, the Defendants caused trichloroethylene and other ultra hazardous substances to be re-

leased from their facility and to enter onto the Plaintiffs' property, contaminating water, soil, vegetation, air, water, land and dwellings. *Id.* ¶ 1. The Plaintiffs further allege that the Defendants have been aware of the contamination for years and "engaged in a conspiracy to perpetrate a fraud on the public, which included making material misrepresentations regarding the character of their operations, their remediation efforts, and the risks posed to human health." *Id.* ¶ 2.

As to the involvement of the United States Environmental Protection Agency ("EPA") and the Ohio Environmental Protection Agency ("Ohio EPA"), the Plaintiffs assert that both agencies have identified the facility "as the source of the large plume of groundwater contaminated with trichloroethylene and other hazardous substances." *Id.* ¶ 26. According to EPA public records, [FN3] the EPA has begun an administrative investigation regarding the facility. *EPA's HRS Documentation Record for Behr Dayton Thermal System VOC Plume,* at http://www.epa.gov/superfund/sites/docrec/pdoc1786.pdf at 10–14. On December 19, 2006, Chrysler and the EPA entered into an Administrative Order by Consent ("AOC") to conduct vapor intrusion investigation and mitigation. *Id.* at 13. In accordance with the AOC, Chrysler took steps to remediate and mitigate the contamination through vapor abatement systems and soil vapor extraction systems. *Id.* at 13–14. The EPA has also sought to list the area subject to this process on the National Priorities List, for further investigation and remedial action. *EPA National Priorities List—Behr Dayton Thermal System VOC Plume,* at http://www.epa.gov/superfund/sites/*pl/nar1786.htm.

> FN3. Both parties, as well as the Magistrate Judge, rely on certain public records, in arguing and analyzing the present Motion. The Court agrees that consideration of the same is appropriate in ruling on a Motion to Dismiss, under Rule 12(b)(6). *Amini v. Oberlin College,* 259 F.3d 493, 502 (6th Cir.2001) ("In determining whether to grant a Rule 12(b)(6) motion, the court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account.") (quoting *Nieman v. NLO, Inc.,* 108 F.3d 1546, 1554 (6th Cir.1997)).

II. *Legal Standards*

A. *Review of Magistrate Judge's Report and Recommendations*

The Defendants' Motion to Dismiss is a dispositive motion. Therefore, pursuant to 28 U.S.C. § 636(b)(1), this Court must conduct a *de novo* review of the Magistrate Judge's Report and Recommendations. *United States v. Curtis,* 237 F.3d 598, 603 (6th Cir.2001) (noting that district courts must conduct a *de novo* review of dispositive motions, while the clearly erroneous standard of review is applicable to non-dispositive motions).

B. *Motion to Dismiss for Failure to State a Claim, under Federal Rule of Civil Procedure 12(b)(6)*

***3** In *Prater v. City of Bumside, Ky.,* 289 F.3d 417 (6th Cir.2002), the Sixth Circuit reiterated the fundamental principles which govern the ruling on a motion to dismiss under Rule 12(b)(6):

> The district court's dismissal of a claim pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure is also reviewed de novo. *Jackson v. City of Columbus,* 194 F.3d 737, 745 (6th Cir.1999), *overruled on other grounds by Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). When deciding whether to dismiss a claim under Rule 12(b)(6), "[t]he court must construe the complaint in a light most favorable to the plaintiff, and accept all of [the] factual allegations as true." *Id.* (citation omitted).

Id. at 424. In *Swierkiewicz v. Sorema N.A.,* 534

U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), the Supreme Court noted that Rule 8(a)(2) of the Federal Rules of Civil Procedure merely requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* at 212. Therein, the Court explained further:

> Such a statement must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. See *id.,* at 47–48; *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 168–169, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). "The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court." 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1202, p. 76 (2d ed.1990).

Id. at 512–13. In *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the Supreme Court rejected the standard established in *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), that a claim should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." The Supreme Court recently expounded upon *Twombly* in *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), writing:

> Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in *Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929, the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the—defendant—unlawfully—harmed—me accusation. *Id.,* at 555 (citing *Papasan v. Allain,* 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." 550 U.S., at 555. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.,* at 557.
>
> ***4** To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.,* at 570. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.,* at 556. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' " *Id.,* at 557 (brackets omitted).
>
> Two working principles underlie our decision in *Twombly.* First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.,* at 555 (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)). Rule 8 marks a notable and generous departure from the hyper—technical, code—pleading regime of a prior era, but it does not unlock the doors of discovery

> for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *id.,* at 556. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context—specific task that requires the reviewing court to draw on its judicial experience and common sense. 490 F.3d, at 157–158. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not "show[n]"—"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).
>
> *Id.* at 1949–50.

In sum, on the plausibility issue, the factual allegations in the complaint need to be sufficient "to give notice to the defendant as to what claims are alleged, and the plaintiff must plead 'sufficient factual matter' to render the legal claim plausible, i.e., more than merely possible." *Fritz v. Charter Twp. of Comstock,* 592 F.3d 718, 722 (6th Cir.2010) (quoting *Iqbal,* 129 S.Ct. at 1949–50). Further, "a legal conclusion [may not be] couched as a factual allegation" and mere "recitations of the elements of a cause of action" are insufficient to withstand a motion to dismiss. *Id.,* (quoting *Hensley Mfg. v. ProPride, Inc.,* 579 F.3d 603, 609 (6th Cir.2009)).

C. *Rule 9(b)'s Requirement to Allege Facts with Particularity*

With regard to the two fraud claims, the Defendants contend that the Plaintiffs' Amended Complaint fails to allege facts, with sufficient particularity. The Federal Rules of Civil Procedure provide that when alleging fraud, "a party must state with particularity the circumstances constituting fraud ...." Fed. R. Civ. Proc. 9(b). As to Rule 9(b)'s additional pleading requirements for fraud claims, the Sixth Circuit explains that,

> ***5** Although Rule 9(b)'s special pleading standard is undoubtedly more demanding than the liberal notice pleading standard which governs most cases, Rule 9(b)'s special requirements should not be read as a mere formalism, decoupled from the general rule that a pleading must only be so detailed as is necessary to provide a defendant with sufficient notice to defend against the pleading's claims.
>
> *United States ex rel. Snapp, Inc. v. Ford Motor Co.,* 532 F.3d 496, 503 (6th Cir.2008) (citing, among others, *Erickson v. Pardus,* 551 U.S. 89, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007)). With regard to the interplay between Rule 9(b) and the policy favoring simplicity in pleadings, as expressed in Rule 8, the Sixth Circuit states that Rule 9(b)'s additional pleading requirements "should not be read to defeat the general policy of 'simplicity and flexibility' in pleadings contemplated by the Federal Rules." *Id.* at 503–04 (quoting *Michaels Bldg. Co. v. Ameritrust Co., N.A.,* 848 F.2d 674, 678 (6th Cir.1988)).
>
> Rather, Rule 9(b) exists predominantly for the same purpose as Rule 8: "to provide a defendant fair notice of the substance of a plaintiff's claim in order that the defendant may prepare a responsive pleading." Rule 9(b), however, also reflects the rulemakers' additional understanding that, in cases involving fraud and mistake, a "more specific form of notice" is necessary to permit a defendant to draft a responsive pleading.
>
> *Id.* at 504 (quoting *Michaels Bldg. Co.,* 848 F.2d at 678; *United States ex rel. Bledsoe v. Cmty. Health Sys.,* 501 F.3d 493, 503 (6th Cir.2007)).

III. *Analysis of Defendants' Motion to Dismiss or Stay (Doc. # 28)*

As previously noted, given the involvement by the EPA and Ohio EPA at the site in question, the Defendants first argue that the Plaintiffs' Amended Complaint should be dismissed or that the litigation should be stayed, under the doctrine of primary jurisdiction. Alternatively, the Defendants ask the Court to dismiss certain of the Plaintiffs' claims, under Rules 9(b) and 12(b)(6). The Court will address these arguments in turn.

A. *Doctrine of Primary Jurisdiction*

In applying the doctrine of primary jurisdiction, "federal courts ... abstain from hearing certain administrative-related matters until the appropriate agency has had the opportunity to interpret unanswered technical and factual issues." *Fieger v. U.S. Atty. Gen.,* 542 F.3d 1111, 1121 (6th Cir.2008) . The doctrine "arises when a claim is properly cognizable in court but contains some issue within the special competence of an administrative agency." *United States v. Any & All Radio Station Trans. Equip.,* 204 F.3d 658, 664 (6th Cir.2000) (quoting *United States v. Haun,* 124 F.3d 745, 749 (6th Cir.1997)). Primary jurisdiction is limited, however, to "cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." *Fieger,* 542 F.3d at 1121 (quoting *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 353, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963)).

> ***6** When the doctrine applies, court proceedings are stayed so that the agency may bring its special competence to bear on the issue. Unfortunately, "no fixed formula exists for applying the doctrine[.]" Rather, "in every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation."

Any & All Radio Station, 204 F.3d at 664 (citing *Haun,* 124 F.3d at 749 and quoting *United States v. Western Pacific. R. Co.,* 352 U.S. 59, 64, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956)).

In the present case, the Magistrate Judge recommended that the Defendants' request for dismissal or stay, pursuant to the primary jurisdiction doctrine, be overruled. Doc. # 45 at 6–10. While the Magistrate Judge opined that the EPA undoubtedly has expertise and experience in at least some of the technical and factual issues in this case, she concluded that the Defendants had not provided sufficient information about the EPA's investigation and remediation efforts to warrant a dismissal or stay, at this early (pre-summary judgment) stage of the litigation.

Defendant Behr [FN4] objects to the Magistrate Judge's recommendations. Doc. # 53 at 3–6. Behr's objections are as follows: (1) the facts, as noted above, indicate that the EPA is involved in investigating and remediating the contaminated site and, thus, it is clear that the case involves technical or policy considerations within the EPA's expertise and, therefore, there is a possibility of inconsistent rulings, if this Court becomes involved; (2) the Magistrate Judge places undue importance on the "present posture" of this case, given that the Court may ultimately be asked to determine an appropriate investigatory and remediation plan, thereby conflicting with the EPA's area of expertise; (3) the Magistrate Judge did not properly distinguish between the Plaintiffs' claims for monetary and injunctive relief, and courts have found that staying requests for injunctive relief, in cases such as the present, is appropriate; and (4) the requests for monetary damages should also be stayed, in that it is too early to predict the future impact of the alleged contamination on health and property values.

> FN4. Defendants Chrysler and Behr joined in filing the Motion to Dismiss or Stay that is the subject of this Opinion. Doc. # 28. Defendant Behr alone filed an objection to the Report and Recommendations, however. Doc. # 53; *see also* Doc. # 49 (Chrysler Not. of Sugg. of Bankr.).

The Court concurs with the Magistrate Judge's recommendation that this litigation not be dismissed or stayed, under the primary jurisdiction doctrine. Initially, the Court notes that courts generally stay litigation, pending an agency's resolution of a matter, rather than dismissing it. *Schwartzman, Inc. v. Atchison, T. & S.F. Ry.,* 857 F.Supp. 838, 844 (D.N.M.1994) ("Defendant is requesting the Court to dismiss Plaintiff's injunctive relief claims pursuant to the doctrine of primary jurisdiction. However, the preferred approach is that 'jurisdiction should be retained by a stay of pro-

ceedings, not relinquished by a dismissal' ....") (quoting *N. Cal. Dist. Council of Hod Carriers, AFL–CIO v. Opinski,* 673 F.2d 1074, 1076 (9th Cir.1982)); *Leib v. Rex Energy Operating Corp.,* 2008 U.S. Dist. LEXIS 102847, *41, 2008 WL 5377792 (S.D.Ill. Dec. 19, 2008) ("When a court chooses to exercise primary jurisdiction, it does not dismiss the litigation but stays it pending the results of the agency's resolution of the issue, and the action resumes after the agency's decision if that decision has not resolved the entire controversy.") (citing, among others, *Baker v. IBP, Inc.,* 357 F.3d 685, 688 (7th Cir.2004)). Thus, if the Defendants' request had been well taken, the Court would have stayed the instant litigation, rather than dismissing it.

***7** However, as previously indicated, the Defendants' request is not well taken. Turning first to the Plaintiffs' request for monetary damages and medical monitoring, such are the province of the courts, rather than the EPA, and thus, staying the litigation under the primary jurisdiction doctrine is inappropriate. Stoll v. Kraft Foods Global, Inc., 2010 U.S. Dist. LEXIS 92926, 2010 WL 3702359 (S.D.Ind. Sept. 6, 2010) (S.D.Ind. Sept. 6, 2010) ("[T]he primary jurisdiction doctrine cannot be used to dismiss or stay claims seeking recovery of monetary damages.") (citing, among others, *Feikema v. Texaco, Inc.,* 16 F.3d 1408, 1417–18 (4th Cir.1994)); *Peters v. Astrazeneca, LP,* 417 F.Supp.2d 1051, 1058 (W.D.Wis.2006) (concluding that courts may refuse to stay proceedings, under the primary jurisdiction doctrine, when plaintiffs are seeking damages for injury to person or property, "as this is the type of relief courts routinely evaluate") (citing *Ryan v. Chemlawn Corp.,* 935 F.2d 129, 131 (7th Cir.1991)). Therefore, the Defendants' Motion to Stay (Doc. # 28) is OVERRULED, as it pertains to the Plaintiffs' claims for monetary damages and medical monitoring.

Considering now the Plaintiffs' request for injunctive relief, the Court notes initially that there is a lack of clarity about whether the Plaintiffs are, in fact, requesting the same. As noted above, in their prayer for relief, the Plaintiffs ask that the Defendants be held liable for various costs associated with medical monitoring and loss of property value, but they do not request injunctive relief. Doc. # 3 (Am.Compl.) at 36. However, some of the provisions within the Amended Complaint could be read to be indicate that the Plaintiffs are seeking the same. *See e.g., id.* ¶ 58 ("Defendants have acted on grounds generally applicable to all members of the proposed classes making final declaratory and injunctive relief concerning the classes as a whole appropriate."). The Plaintiffs' memoranda in opposition to the Defendants' Motion add further confusion to the question, in that they seem to indicate both that the Plaintiffs *do not* intend to seek injunctive relief and that they *do.* Doc. # 30 at 8 ("Defendants' entire argument rests ... on irrelevant cases in which plaintiffs sought injunctive relief, rather than damages"); *id.* at 19 ("Even if plaintiffs were to seek certain injunctive relief ...."); Doc. # 55 at 11 (stating that the "EPA has neither the mandate nor the financial resources to compensate plaintiffs for their damages and may be incapable of providing certain necessary injunctive relief"); *id.* at 12 (arguing that "staying this case would unfairly prolong plaintiffs' exposure to Behr's toxic chemicals, present significant additional health risks, and delay medical monitoring"). In resolving the question that is currently before it, the Court will proceed on the assumption that the Plaintiffs *are* seeking injunctive relief, in the form of remediation, mitigation or the like. However, the Court orders the Plaintiffs to file a Second Amended Complaint, as provided *infra,* for the purpose of clarifying whether they are seeking injunctive relief and, if so, what kind.

***8** Moving to the merits of the Defendants' primary jurisdiction argument and the Plaintiffs' request for injunctive relief, the Court once again concurs with the Magistrate Judge. While remediation and mitigation of superfund sites are certainly within the expertise of the EPA, courts typically resolve questions of primary jurisdiction regarding such claims, at the summary judgment stage of lit-

igation, rather than at the motion to dismiss stage. *Holder v. Gold Fields Mining Corp.*, 506 F.Supp.2d 792 (N.D.Okla.2007); *Schwartzman, Inc. v. Atchison, T. & S.F. Ry.*, 857 F.Supp. 838 (D.N.M.1994). Such an approach is especially warranted in the present case, given that there is currently no information in either the Amended Complaint or the public records highlighted in the Facts Section above (and pointed to by the Defendants) that in any way ties Defendant Behr (as opposed to Defendant Chrysler) to the EPA's remediation activities at the site. For example, the EPA's *HRS Documentation Record for Behr Dayton Thermal System VOC Plume* indicates that Chrysler (not Behr) and the EPA entered into an AOC to conduct vapor intrusion investigation and mitigation, but does not indicate that Behr is in any way involved in those actions. http://www.epa.gov/superfund/sites/docrec/pdoc1786.pdf at 10–14. Further, there is no indication as to whether Chrysler is still involved in the remediation and mitigation efforts.

The Defendants are not foreclosed from requesting a stay of proceedings, as to the Plaintiffs' request for injunctive relief, should they ultimately set forth sufficient facts to indicate that protection of the integrity of the regulatory scheme in question dictates preliminary resort to the EPA. *See Fieqer,* 542 F.3d at 1121. Such a request is premature, at this juncture, however. Therefore, the Defendants' Motion to Stay (Doc. # 28) is OVERRULED, as it pertains to the Plaintiffs' claims for injunctive relief.

B. *Whether Certain Claims Should be Dismissed for Failure to State Claims and/or Failure to Plead Fraud with Particularity*

As previously noted, the Defendants have moved to dismiss certain of the Plaintiffs' claims (Counts III, VI–XIII) for failure to state a claim, under Rule 12(b)(6), and for failure to plead fraud with particularity. The Magistrate Judge recommends that the Defendants' Motion be overruled, as to all claims except for the claims for medical monitoring (Count VII) and for punitive/exemplary damages (Count XIII). Doc. # 45 at 10–19. As to those two claims, the Magistrate Judge properly recognizes that Ohio law does not recognize independent causes of action for the same and the Plaintiffs concede the merits of such a conclusion. *Id.* at 19; Doc. # 30 at 24. Thus, the Defendants' Motion to Dismiss (Doc. # 28) Counts VII and XIII is SUSTAINED.

With regard to the remaining claims, the Defendants do not object to the Magistrate Judge's recommendations, as to Count III (unjust enrichment), Count VI (negligence *per se*) or Count VIII (battery). *See* Doc. # 53. Finding the Magistrate Judge's conclusions on those claims to be legally sound, the Court OVERRULES the Defendants' Motion to Dismiss (Doc. # 28) Counts III, VI and VIII, for the reasons set forth by the Magistrate Judge, in her Report and Recommendations (Doc. # 45 at 10–13).

***9** The claims remaining in contention are those for intentional fraudulent concealment (Count IX), negligent fraudulent concealment (Count X), negligent misrepresentation (Count XI) and civil conspiracy (Count XII). The Court will address each such claim, in turn.

1. *Intentional Fraudulent Concealment (Count IX) and Negligent Fraudulent Concealment (Count X)*

The Ohio Supreme Court instructs that the elements of a cause of action for fraud are as follows:

> (a) a representation or, *where there is a duty to disclose, concealment of a fact;*
>
> (b) which is material to the transaction at hand;
>
> (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred;
>
> (d) with the intent of misleading another into relying upon it;

(e) justifiable reliance upon the representation or concealment; and

(f) a resulting injury proximately caused by the reliance.

Williams v. Aetna Fin. Co., 83 Ohio St.3d 464, 475, 700 N.E.2d 859 (1998) (emphasis added) (quoting *Cohen v. Lamko, Inc.,* 10 Ohio St.3d 167, 169, 462 N.E.2d 407, 409 (1984)); *see also Harris v. Huff,* 2010 Ohio 3678, ¶ ¶ 125–31, 2010 Ohio App. LEXIS 3140, 2010 WL 3081387 (Ohio 11th App. Dist. Aug. 6, 2010) (same); *Norco Equip. Co. v. Simtrex, Inc.,* 2009 Ohio 5562, ¶ 41, 2009 Ohio App. LEXIS 4687, 2009 WL 3387740 (Ohio 8th App. Dist. Oct. 22, 2009) (same). As indicated by the first element, if a complaint alleges concealment, it must also allege an underlying duty to speak. "The duty to speak does not depend on the existence of a fiduciary relationship between the parties. It may arise in any situation where one party imposes confidence in the other because of that person's position, and the other party knows of this confidence." *Central States Stamping Co. v. Term. Equip. Co.,* 727 F.2d 1405, 1409 (6th Cir.1984) (citing *Smith v. Patterson,* 33 Ohio St. 70, 75–76 (1877)).

Upon her review of the present Amended Complaint, the Magistrate Judge concluded that it alleged each of the required elements of fraud with sufficient particularity. Doc. # 45 at 14–17. The Defendants object, arguing that the Amended Complaint does not sufficiently allege that Behr had a duty to speak or that Behr "concealed" any information. Doc. # 53 at 6–7. The Defendants also contend that the Amended Complaint offers no factual allegations "about the relationship between the parties, when the relationship arose, or how Plaintiffs' reliance on Defendants' alleged omissions was both reasonable and detrimental." *Id.* at 6.

Beginning with the second allegation first, the Court notes that the Defendants' reliance on these elements (the relationship between the parties, when the relationship arose, and whether the Plaintiffs' reliance on the Defendants' alleged omissions was both reasonable and detrimental) can be traced to a case that arose out of the Northern District of Ohio. That District Court, in *Randleman v. Fidelity National Title Insurance Co.,* determined that a plaintiff must allege the noted elements (as well as others), with reasonable particularly, in order to properly plead a claim of fraudulent concealment. *Randleman,* 465 F.Supp.2d 812, 822 (N.D.Ohio 2006). In support of the noted elements, the Court cited a case from a North Carolina Court, *Nakell v. Liner Yankelevitz Sunshine & Re g enstreif, LLP,* 394 F.Supp.2d 762, 767 (M.D.N.C.2005). With all due respect to the District Court from the Northern District of Ohio, when deciding the sufficiency of a pleading of an Ohio state law claim, this Court is compelled to adopt standards established by Ohio state courts, rather than North Carolina courts. Therefore, this Court will apply the fraud elements as set forth by the Ohio Supreme Court (which are similar, but not identical to, the ones established by the North Carolina District Court), as set forth above.

***10** The Court now returns to the question of whether the Amended Complaint alleges, with sufficient particularity, the other challenged elements of the fraud claims, to wit: that Behr had a duty to speak and that Behr concealed information. Among other provisions in the Amended Complaint, the Plaintiffs point to the following, in support of their assertion that they have adequately pled the contested elements of their fraud claims:

- In support of the duty to speak, allegations pertaining to the physical proximity of Defendants' facility to Plaintiffs' properties, as well as Defendants' knowledge of the groundwater contamination that was migrating toward Plaintiffs' property, a fact that was not known to the Plaintiffs. Doc. # 3 (Am.Compl.) ¶¶ 2, 3, 5, 13–16.

- In support of concealment, allegations pertaining to Defendants' concealment of information re-

garding the nature, extent and magnitude of the contamination that had migrated onto surrounding property.[FN5] *Id.* ¶¶ 9, 121–24, 139.

> FN5. The Court finds it curious that the Defendants have argued that the Plaintiffs did not allege concealment (Doc. # 53 at 6 ("Plaintiffs failed to allege with particularity a single action by Behr to 'conceal' information."), given the Amended Complaint's specific allegation that "Defendants negligently concealed and failed to disclose to plaintiffs ... material facts concerning the nature, extent, magnitude, and effect of the exposure of plaintiffs ... to the toxic and hazardous materials and contaminants emitted, released, stored, handle[d], processed, transported, and/or disposed of in and around the Facility and the surrounding environment." Doc. # 3 (Am.Compl.) ¶ 121.

Docs. # 30 at 26–27, # 55 at 12–13. The Court agrees with the Magistrate Judge's conclusion that these allegations provide the Defendants with sufficiently specific notice of the substance of the Plaintiffs' fraud claims (specific to the duty to speak and concealment), in order that the Defendants may prepare a responsive pleading, as is required by Rule 9(b) and Ohio law. *See e.g., Javitch v. First Montauk Fin. Corp.,* 279 F.Supp.2d 931, 940 (N.D.Ohio 2003) ("Thus, the nondisclosure of a relevant fact is tantamount to fraudulent concealment where a duty arises on the part of the person with knowledge of a material fact which impinges upon the relationship.") (quoting *Leal v. Holtvogt,* 123 Ohio App.3d 51, 76, 702 N.E.2d 1246 (Ohio 2nd App. Dist.1998)). The Court also concludes that these allegations give sufficient notice to the Defendants as to the alleged duty to speak and concealment, such as to render the Plaintiffs' fraud claims plausible, as is required by Rule 12(b)(6). Therefore, the Defendants' Motion to Dismiss (Doc. # 28) is OVERRULED, as it pertains to the Plaintiffs' claims for intentional fraudulent concealment (Count IX) and negligent fraudulent concealment (Count X).

2. *Negligent Misrepresentation (Count XI)*

Ohio law defines the elements of the tort of negligent misrepresentation as follows:

> One who, in the course of his business, profession or employment ... *supplies false information* for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

HDM Flugservice GmbH v. Parker Hannifin Corp., 332 F.3d 1025, 1033 (6th Cir.2003) (quoting *Sindel v. Toledo Edison Co.,* 87 Ohio App.3d 525, 622 N.E.2d 706, 710 (Ohio 3rd App. Dist.1993), which quotes Restatement of Law, Torts 2d § 522 (1977)) (emphasis added). "Further, negligent misrepresentation can only be found where an affirmative false statement is made, not merely where the statements are omitted." *Camp St. Marys Ass'n v. Otterbein Homes,* 176 Ohio App.3d 54, 69, 889 N.E.2d 1066 (Ohio 3rd App. Dist.2008) (quoting *Rockford Homes. Inc. v. Handel,* 2007 Ohio 2581, 2007 Ohio App. LEXIS 2405, 2007 WL 1544711 (Ohio 5th App. Dist. May 25, 2007)).

***11** Upon her review of the Amended Complaint, the Magistrate Judge concluded that it sufficiently alleged the elements of negligent misrepresentation. Doc. # 45 at 17–18. The Defendants object, arguing that the "Plaintiffs' Amended Complaint does not contain allegations of a single statement, let alone a false statement, made by Defendants." Doc. # 53 at 7.

The Court agrees with the Magistrate Judge and disagrees with the Defendants. The Amended Complaint alleges that the Defendants "ma[de] material misrepresentations regarding the character of their operations, their remediation efforts, and the risks posed to human health." Doc. # 3

(Am.Compl.) ¶ 2. The Court concludes that these allegations give sufficient notice to the Defendants, as to the alleged affirmative false statements made by them, such as to render the Plaintiffs' claim for negligent misrepresentation plausible. Therefore, the Defendants' Motion to Dismiss (Doc. # 28) is OVERRULED, as it pertains to the Plaintiffs' claim for negligent misrepresentation (Count XI).

3. *Civil Conspiracy (Count XII)*

In Ohio, a civil conspiracy consists of "a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." *Morrow v. Reminger & Reminger Co. LPA,* 183 Ohio App.3d 40, 60, 915 N.E.2d 696 (Ohio 10th App. Dist.2009) (quoting *Kenty v. Transamerica Premium Ins. Co.,* 72 Ohio St.3d 415, 419, 1995 Ohio 61, 650 N.E.2d 863 (1995)). With regard to pleading a civil conspiracy claim in Ohio, the same "must be pled with some degree of specificity, and vague or conclusory allegations that are unsupported by material facts will not be sufficient to state a claim." *Ghaster v. City of Rocky River,* 2010 U.S. Dist. LEXIS 71020, *33, 2010 WL 2802685 (N.D.Ohio May 12, 2010) (quoting *Avery v. City of Rossford,* 145 Ohio App.3d 155, 165, 762 N.E.2d 388 (Ohio Ct.App.2001)); *see also Jaco v. Bloechle,* 739 F.2d 239, 245 (6th Cir.1984) (determining that conclusory language void of factual allegations was insufficient to support conspiracy claim).

As with the other claims, the Magistrate Judge determined that the Amended Complaint sufficiently alleged a claim of civil conspiracy. Doc. # 45 at 18–19. The Defendants object, arguing that the Plaintiffs provide only "a vague allegation that the [D]efendants 'reached an agreement to act in concert', [but] fail to point to any specific facts that would support such a conclusory statement." Doc. # 53 at 7–8 (quoting Doc. # 3 (Am.Compl.¶ 139)).

Nine paragraphs comprise the Amended Complaint's civil conspiracy claim. Doc. # 3 (Am.Compl.) ¶¶ 136–44. Pertinent to the challenged element of the claim ("a malicious combination of two or more persons"), the only assertions set forth therein read as follows:

> *[The] Defendants reached agreement to act in concert* to mask the true extent of contamination, thereby enabling the defendants to avoid taking all appropriate steps to remediate the facility and the surrounding environment or to mitigate dangers created by their release, discharge, storage, handling, processing, disposal of and dumping of hazardous substances at the facility and the surrounding environment. *Acting in concert* to affect these unlawful and wrongful acts and omissions, defendants inflicted damages upon the plaintiffs and the members of the class.

***12** *Id.* ¶ 139 (emphasis added). The Defendants argue that the Plaintiffs need to do more than to make the conclusory statements that the Defendants "reached [an] agreement to act in concert" and "act[ed] in concert". The Court agrees.

As noted above, courts have required plaintiffs to plead a common law claim for civil conspiracy with some degree of specificity, rather than simply rephrasing the elements of the claim. The Plaintiffs' allegations that the Defendants "reached an agreement to act in concert" and "acted in concert" are simply restatements of the civil conspiracy element requiring "a malicious combination of two or more persons". Nowhere in the remaining nine paragraphs of the civil conspiracy claim (or elsewhere in the Amended Complaint, that the Court could locate) are there factual allegations that support the conclusory statement that the Defendants agreed to act in concert or did, in fact, act in concert. For example, the Amended Complaint alleges that the Defendants (plural) wrongfully released and handled the toxic substances, as well as alleging that *each* Defendant failed to take steps to prevent or minimize the Plaintiffs' exposure, but does not allege that the Defendants acted in concert when committing any of these wrongs. Doc. # 3 (Am.Compl.) ¶¶ 140–42. Other courts have found this sort of conclusory pleading to be lacking, in common law civil

conspiracy claims, and this Court agrees. *E.g., Trans Rail Am., Inc. v. Hubbard Twp.*, 2010 U.S. Dist. LEXIS 2682, 2010 WL 184082 (N.D.Ohio Jan. 13, 2010) (finding a pleading insufficient when it merely alleged "that numerous individual defendants have committed wrongs," rather than alleging "a single fact that would support a conclusion that the defendants had combined to wrong [the plaintiff]"); *In re Nat'l Century Fin. Enters., Inv. Litig.*, 504 F.Supp.2d 287 (S.D.Ohio 2007) (rejecting a complaint that rested on the bare allegation that the defendants reached a "meeting of the minds" to harm the plaintiffs, but contained no allegations "that would support the existence of a common understanding or shared objective" between the defendants; "The complaint fails to indicate what relationship the [defendants] may have had with these parties or when or how they reached a common understanding."). Therefore, the Defendants' Motion to Dismiss (Doc. # 28) is SUSTAINED, as it pertains to the Plaintiffs' claim for civil conspiracy (Count XII).

In their response to the Defendants' Motion to Dismiss, the Plaintiffs have requested leave to amend their Amended Complaint, should the Court conclude that it contained any pleading deficiencies. Doc. # 30 at 9. The Defendants have presented no arguments to the contrary, with regard to this request. *See* Docs. # 31, # 53. Therefore, the Court grants the Plaintiffs leave to file a Second Amended Complaint, in order to plead the assertions with regard to their civil conspiracy claim with greater specificity, to the extent it is possible to do so within the bounds of Federal Rule of Civil Procedure 11 .

VI. *Conclusion*

***13** The Defendants' Motion to Dismiss (Doc. # 28) is SUSTAINED, as to the following claims:

- All claims pending against Defendant Behr Dayton Thermal Plant, LLC
- Count VII
- Count XII
- Count XIII

The Defendants' Motion to Dismiss (Doc. # 28) is OVERRULED, as to all other claims in the Plaintiffs' Amended Complaint (Doc. # 3). The Magistrate Judge's Report and Recommendations (Doc. # 45) are ADOPTED, in part, and REJECTED, in part. The Defendants' objections thereto (Doc. # 53) are OVERRULED, in part, and SUSTAINED,in part.

The Plaintiffs are instructed to file a Second Amended Complaint within 14 days from the date of this Decision. In so doing, the Plaintiffs may amend only the following: (1) omit all claims against Behr Dayton Thermal Plant, LLC; (2) add clarifying language as to whether they are seeking injunctive relief and, if so, what kind; (3) re-plead the civil conspiracy claim with greater specificity (to the extent it is possible to do so within the bounds of Federal Rule of Civil Procedure 11); and (4) add erroneously omitted page 5.

S.D.Ohio,2011.
Spears v. Chrysler, LLC
Not Reported in F.Supp.2d, 2011 WL 540284 (S.D.Ohio)

END OF DOCUMENT

Exhibit L

Not Reported in N.E.2d, 1994 WL 484205 (Ohio App. 2 Dist.)
(Cite as: 1994 WL 484205 (Ohio App. 2 Dist.))

Court of Appeals of Ohio, Second District, Clark County.
Danile E. **DOYLE** Plaintiff-Appellant,
v.
THE OHIO COMPANY Defendant-Appellee.

No. 94-CA-16.
Sept. 9, 1994.

Walter V. Hines, Springfield, Plaintiff-Appellant.

Dennis J. Concilla, Carlile Patchen & Murphy, Columbus, for Defendant-Appellee.

YOUNG, Judge.

***1** Mr. Doyle is appealing from the grant of summary judgment to the Ohio Company by the trial court on the ground that his claims were barred by Ohio's four year statute of limitations for claims of fraud. R.C. § 2305.09(C). Because we find that a genuine issue of material fact remains as to when Mr. Doyle reasonably should have discovered the fraud or was put on sufficient notice of the possibility of fraud that would lead a reasonable person to immediately begin an investigation, the summary judgment will be reversed and cause remanded.

One of the stockbrokers employed by the Ohio Company during the years of 1982-1988 was a Mr. Arden Berg. Beginning in 1982, Mr. Doyle retained the services of Mr. Berg as his broker and investment advisor. Mr. Doyle claims that he followed Mr. Berg's advice completely and relied totally on his broker's recommendations. Mr. Berg left the Ohio Company sometime in 1988. Mr. Doyle followed him to his new employer and continued to use Berg's services until early in 1990 when, upon the advice of his tax attorney, he consulted another stockbroker and was informed that the investments Mr. Berg had led him into were unsuitable for him and had substantially decreased in value.

The investments in issue were units of a limited partnership known as First Capital Income Properties. When Mr. Doyle became a client of Mr. Berg his portfolio consisted of municipal bonds. Beginning in 1985, upon the urging of Mr. Berg, Mr. Doyle sold his municipal bonds and purchased $57,000 worth of units of the limited partnership. Berg had allegedly told Doyle that his money would double in three years and that the President of the company he was investing in was a personal friend of Berg's. In 1987, again at the urging of Mr. Berg, Mr. Doyle purchased another $20,000 worth of the units of the same limited partnership.

After Mr. Doyle discovered, in 1990, the extent of his loss, he pursued both the Ohio Company and Mr. Berg's new employer, who ultimately settled with Mr. Doyle by paying $20,000 to him.

Receiving no satisfaction from the Ohio Company, he filed his complaint against it on November 20, 1992, seeking the sum of $50,000 "less any current value of First Capital along with compensatory damages measured by the amount that a well-managed account would have generated from January 5, 1985, to the date of trail [sic], taking into account distributions, along with punitive damages in the amount of $171,000 and reasonable attorney fees and the cost." (Complaint, paragraph 13). With leave of court, Mr. Doyle filed an amended complaint on September 14, 1993, in which he increased his claim for damages to $77,000 and his claim for punitive damages to $300,000.

After taking a deposition of Mr. Doyle, the Ohio Company filed its motion for summary judgment on October 15, 1993. The motion was accompanied with a memorandum and exhibits, including

excerpted portions of Mr. Doyle's deposition. The motion was based entirely on the argument that the applicable four year statute of limitations had run before the plaintiff filed his suit. After receiving and considering more memoranda from both parties and a further affidavit of Mr. Doyle, the trial court rendered summary judgment in favor of the Ohio Company on January 31, 1994. The entry of summary judgment simply cited Ohio's four year statute of limitations for claims of fraud, but rendered no analysis whatsoever.

***2** In Ohio, summary judgment is governed by Civ.R. 56(C) which provides in relevant part:

> " * * * Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

Thus before summary judgment may be granted, the court must find that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and that favors the movant. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 4 O.O.3d 466, 364 N.E.2d 267. In reviewing summary judgment, an appellate court must view the evidence in a light most favorable to the party opposing the motion. *Osborne v. Lyles* (1992), 63 Ohio St.3d 326, 587 N.E.2d 825. When the evidence is so viewed, if reasonable minds can come to differing conclusions, the motion for summary judgment should be overruled. *Hounshell v. Am. States Ins. Co.* (1981), 67 Ohio St.2d 427, 21 O.O.3d 267, 424 N.E.2d 311.

The sole issue before the trial court, which was presented by the defendant's motion for summary judgment here, was whether the Ohio four year statute of limitations for claims of fraud applied to bar the particular claim presented by Plaintiff Doyle. The Ohio Statute on the subject is Ohio R.C. § 2305.09, which provides, in relevant part, as follows:

> § 2305.09
>
> An action for any of the following causes shall be brought within four years after the cause thereof accrued: ... (C) For relief on the ground of fraud; ... If the action is for ... [fraud] the causes thereof shall not accrue ... until the fraud is discovered.

It is standard law in Ohio that this statute of limitations on fraud does not begin to run until the fraud has been actually discovered or should have been discovered. *Investors Reit One v. Jacobs* (1989), 46 Ohio St.3d 176. *66 Ohio Jurisprudence 3d (1986), Limitations and Laches, Section 98, page 243.*

> Where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, knowledge of the fraud will be imputed to him and he will be held to have actually known what he might and ought to have known. [citations omitted]
>
> ***3** *Id,* at 244.

The Ohio Company strenuously argues that the statute began to run on Mr. Dole back in 1986 or maybe 1987 because of the following exchange in Mr. Doyle's deposition:

Q. When did you first decide you didn't really-or

Not Reported in N.E.2d, 1994 WL 484205 (Ohio App. 2 Dist.)
(Cite as: 1994 WL 484205 (Ohio App. 2 Dist.))

let me strike that.

When you did you first decide you had some concerns about whether you could trust Mr. Berg?

A. Could Trust Mr. Berg?

Q. Yes.

A. When he used to invite us people down to his house I could see what he had down there and he used to kind of gloat about it. And I'd think to myself, a person in this position doesn't gloat about things, they keep quite [sic] about things. But he would impress upon you that he had the best and whatever he wanted to get he would get.

One time we went down, that's when he put in an above-ground swimming pool, very nice. And he showed us that. Then about two or three years later tore that out and put in an in-ground swimming pool in.

Seemed to him money was no object, he just did what he wanted to do.

Q. I'm trying to get when did you in your own mind change and say, "I can't trust this guy anymore or I am not sure I can trust him"?

A. I suppose at that point my mind began to question things. Because a person doesn't act like that. He acquires things, he doesn't show it off to somebody.

Q. This was?

A. Probably back in-I suppose maybe '87 probably or '86 I think.

Q. What did you do about it at that time?

A. What did I do about it?

Q. Right.

A. In what respect?

Q. If you have this concern-Most of us when we have a concern we try to convince ourselves in some ways our concern isn't justified.

A. I just kept it to myself. Depo., 53-54.

Mr. Doyle explained in a subsequent affidavit that his testimony quoted above indicated that he did not appreciate Mr. Berg's attitude "towards the possessions he had acquired. My testimony in no way was to imply that at that time I did not trust Mr. Berg's financial judgment or the investments that he recommended." Affidavit Exhibit B2, memorandum contra to motion for summary judgment, Docket 14.

The Ohio Company also points to the following exchange in Mr. Doyle's deposition as an argument that the statute began to run at least in January 1988:

Q....You purchased Series X in January of '85 and you were told it was going to double in three years.

A. Right.

Q. By January of '88 you knew it hadn't doubled, right?

A. Right.

Q. I assume at that time you first became suspicious and started wondering what was going on.

A. Naturally.

Q. Did you talk to Mr. Berg about it then?

A. No.

Q. Why not?

A. I called about that, he said not to worry. Said I had a good investment. Depo., 52.

Mr. Doyle countered that he continued to rely completely on Mr. Berg's investment advice after

January of 1988. Although his investment had not doubled in value, he did not know at the time that it had suffered an actual decline in value. The cases wholly relied upon by the Ohio Company involve situations where the investors had actual knowledge of decline in value of investments or other misdeeds such as churning, which therefore began the statute of limitations in Ohio. *Militsky v. Merrill Lynch, Pierce, Fenner & Smith* (1980), 540 F Supp. 783. *Hupp v. Gray* (1974), 500 F.2d 993.

***4** The plaintiff, in his brief, makes the following argument with regard to the discovery issue:

> In considering this set of facts in the most favorable light for the Appellant, considering the issue of when the Appellant should have discovered the suitability fraud, three time areas present themselves:
>
> 1) In 1986-1987 when Mr. Doyle testified that he began to distrust Mr. Berg, or in 1988, when the 1985 investment didn't double (even though Doyle did not know the investment's value), as advanced by Appellee.
>
> 2) In May of 1989 when the distributions on one series began to diminish and Mr. Doyle "... knew something had to be wrong ..." (DEPO p. 50); or,
>
> 3) In early 1990 when Doyle talked to the local broker and found out he had been had.
>
> Two of these time frames would be within the four year statute of limitations; however, the point is that this determination is one of fact and should be made by the trier of the facts, not the Lower Court Judge on Motion for Summary Judgment. Brief of Appellant, 3.

From all the evidence in the record, and considering the facts in a light most favorable to the plaintiff, Mr. Doyle, we cannot determine that there is no genuine issue regarding the material fact of when Mr. Doyle should have begun an active investigation of Mr. Berg's advice. Determination of when a reasonable person in Mr. Doyle's shoes is put on inquiry notice is not a simple matter. It is an issue that has to be determined by the sound judgment of the trier of the fact, presumably in this case a jury. It involves a careful weighing of all the evidence and, obviously, the credibility of witnesses is involved in such weighing. Where a genuine issue of material fact as to when fraud, if any, was or should have been discovered it is appropriate and necessary to submit the issue to the trier of the fact. *R. Renaissance, Inc. v. Rohm and Haas Co.* (S.D. Ohio 1987) 674 F.Supp 591. *Nesbit v. McNeil* (9th Cir.1990), 896 F.2d 380, 385. This court itself has held that the date of discovery or presumed discovery which begins the accrual of statute of limitations is a issue of fact which has to be determined by the trier of fact. *Kettering v. Berger* (1982) 4 Ohio App.3d 254, 261.

In addition, Mr. Doyle argues that a fiduciary relationship existed between him and Mr. Berg which might toll the running of the statute of limitations until his actual discovery of presumed fraud. Fiduciary relationships can exist between a stockbroker and his client. See *Thorp v. Bache Halsey Stuart Shields, Inc.* (1981), 650 F.2d 817. But again, it is a factual issue which must be determined by the trier of fact after weighing all the evidence. The judgment of the trial court in this case made no mention of this issue nor, as we have stated, did it indicate when the statute of limitations began to run in Mr. Doyle's situation, only, sometime prior to four years before he filed his complaint. The question of the possible fiduciary relationship is another issue of genuine material fact that precludes the grant of summary judgment in this case.

***5** As Judge Fain of this court has written:

> This court has often stated its preference for deciding causes of action upon their merits. We find support for this preference in Section 16, Article I of the Ohio Constitution, which provides as follows:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."
>
> Statutes of limitations are important and necessary limitations upon this right. They are necessary to provide for the eventual repose of all disputes, both actual and potential. However, since they are limitations upon the rights of the citizens of Ohio for redress, cases in which the application of a statute of limitations is doubtful should be resolved in favor of permitting the case to be decided upon its merits.

Wisecup v. Gulf Development (1989), 56 Ohio App.3d 162, 165.

We find that summary judgment for the Ohio Company was inappropriate in this case and the matter is therefore reversed and remanded to the trial court for further proceedings consistent with this opinion.

Grady, P.J., and Fain, J., concur.

Ohio App. 2 Dist.,1994.
Doyle v. Ohio Co.
Not Reported in N.E.2d, 1994 WL 484205 (Ohio App. 2 Dist.)

END OF DOCUMENT

Exhibit M

15 N.E.3d 131, 307 Ed. Law Rep. 1057
(Cite as: 15 N.E.3d 131)

C

Court of Appeals of Indiana.
Linda D. McINTIRE, and those similarly situated, Appellants–Plaintiffs,
v.
FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, Appellee–Defendant.

No. 49A02–1401–PL–2.
Aug. 18, 2014.

Background: Parent filed complaint for damages and injunctive relief, claiming that township school corporation was violating the Indiana Constitution by charging locker fee, newspaper fee, activity fee, ID fee, technology fee, student planner fee, and textbook rental fee. The Superior Court, Marion County, John F. Hanley, J., entered summary judgment for school cooperation, and parent appealed.

Holdings: The Court of Appeals, Mathias, J., held that:
(1) parent need not have filed a notice of her claim under the Indiana Tort Claims Act (ITCA), and
(2) parent did not establish claim for damages because there was no right of action for monetary damages under the Indiana Constitution.

Affirmed.

West Headnotes

[1] Education 141E ⚿363

141E Education
141EII Public Primary and Secondary Schools
141EII(A) Establishment, Operation, and Regulation in General
141EII(A)11 Claims Against District
141Ek362 Notice, Demand, or Presentation of Claim
141Ek363 k. In general. Most Cited Cases

Parent's complaint against township school corporation, alleging that fees charged by corporation were unconstitutional, was not based on contract for purposes of determining whether parent's complaint sounded in tort so as to be subject to the notice requirements of the Indiana Tort Claims Act (ITCA); in parent's complaint, there was no allegation of the basic elements of a contract claim, such as an offer, acceptance, a manifestation of mutual assent, and consideration, and merely living in the boundaries of a school corporation could not form the basis of a contract. West's A.I.C. 34–13–3–1.

[2] Municipal Corporations 268 ⚿741.30

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k741 Notice or Presentation of Claims for Injury
268k741.30 k. Service or presentation; time therefor. Most Cited Cases

In general, the Indiana Tort Claims Act (ITCA) requires notice of claims against governmental entities and public employees to be given soon after the event. West's A.I.C. 34–13–3–1.

[3] Education 141E ⚿363

141E Education
141EII Public Primary and Secondary Schools
141EII(A) Establishment, Operation, and Regulation in General
141EII(A)11 Claims Against District
141Ek362 Notice, Demand, or Presentation of Claim
141Ek363 k. In general. Most Cited Cases

Parent's complaint against township school corporation, alleging that fees charged by corporation were unconstitutional, was not based on a "loss" as defined by the Indiana Tort Claims Act (ITCA), and thus, parent need not have filed a notice of her claim under the ITCA; parent's claim was not based

on an injury to or death of a person or damages to property. West's A.I.C. 34–13–3–1, 34–6–2–75.

[4] Action 13 ⚿1

13 Action
13I Grounds and Conditions Precedent
13k1 k. Nature and elements of cause of action and suspension of remedies. Most Cited Cases

Education 141E ⚿682

141E Education
141EII Public Primary and Secondary Schools
141EII(E) Pupils or Students
141EII(E)2 Admission and Attendance
141Ek681 Payment for Tuition and Fees
141Ek682 k. In general. Most Cited Cases

Parent, who alleged that township school corporation's actions of charging locker and newspaper fees amounted to charging for "tuition," which was prohibited by State Constitution, did not establish claim for damages because there was no right of action for monetary damages under the Indiana Constitution. West's A.I.C. Const. Art. 8, § 1.

***132** Christopher K. Starkey, Indianapolis, IN, Attorney for Appellant.

V. Samuel Laurin III, Bryan H. Babb, Joel T. Nagle , Bose McKinney & Evans LLP, Indianapolis, IN, Attorneys for Appellee.

OPINION

MATHIAS, Judge.

Linda McIntire ("McIntire") appeals the Marion Superior Court's grant of summary judgment in favor of Franklin Township Community School Corporation ("the School Corporation"). On appeal, McIntire argues that the trial court erred in concluding: (1) that her claim was barred by her failure to provide the required notice under the Indiana Tort Claims Act ("ITCA"), and (2) that Article 8, Section 1 of the Indiana Constitution does not provide for a private cause of action for monetary damages. We conclude that the trial court erred in concluding that McIntire's claim was subject to the notice requirements***133** of the ITCA but nevertheless affirm the trial court's grant of summary judgment because McIntire may not maintain a claim for monetary damages under Article 8, Section 1 of the Indiana Constitution.

Facts and Procedural History

The facts underlying this appeal are undisputed. McIntire lived in Franklin Township in Marion County during the 2011–2012 school year. During this school year, the School Corporation charged certain fees to students in grades 9 through 12, including: (1) a $1.50 locker fee, (2) a $1.50 newspaper fee for each student who received a newspaper, (3) a $2.00 activity fee, (4) a $3.00 ID fee, (5) a $10.00 technology fee, (6) a $4.00 student planner fee, and (7) a textbook rental fee based on the formula set forth in the relevant Indiana statutes. McIntire paid these fees for her children, who attended schools operated by the School Corporation.

McIntire believed that these fees were impermissible under the Education Clause, found in Article 8, Section 1 of the Indiana Constitution.[FN1] Accordingly, on December 2, 2011, McIntire filed a complaint for damages and injunctive relief claiming that the School Corporation was violating the Indiana Constitution by charging these fees. The complaint sought an injunction preventing the School Corporation from collecting the fees and demanded the return of the fees already paid. The School Corporation filed its answer on February 15, 2012, setting forth several affirmative defenses, including that McIntire had not complied with the notice provisions of the ITCA. The School Corporation also claimed that the Education Clause did not provide McIntire with a cause of action for monetary damages.

FN1. This portion of the Indiana Constitution provides:

> Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.
>
> Ind. Const. art. VIII, § 1.

On July 24, 2013, the School Corporation filed a motion for summary judgment. After receiving an extension of time in which to respond to this motion, McIntire filed her response on September 6, 2013, in which she admitted that she did not file an ITCA notice. She claimed, however, that such notice was not required. The trial court held a summary judgment hearing on September 16, 2013, and took the matter under advisement. On September 30, 2013, the trial court entered an order granting the School Corporation's motion for summary judgment, concluding that McIntire's claim was barred because she had failed to comply with the notice requirements of the ITCA and because the Education Clause of the Indiana Constitution did not provide her with a right to a cause of action against the School Corporation for monetary damages. McIntire now appeals.

Summary Judgment

The standard of review we apply on review of a trial court's order granting or denying summary judgment is well settled:

> Our standard for reviewing a trial court's order granting a motion for summary judgment is well settled. A trial court should grant a motion for summary judgment only when the evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The trial court's grant of a motion for summary judgment comes ***134** to us cloaked with a presumption of validity. An appellate court reviewing a trial court summary judgment ruling likewise construes all facts and reasonable inferences in favor of the non-moving party and determines whether the moving party has shown from the designated evidentiary matter that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. But a *de novo* standard of review applies where the dispute is one of law rather than fact. We examine only those materials designated to the trial court on the motion for summary judgment. [Where] the trial court ma[kes] findings of fact and conclusions of law in support of its entry of summary judgment, ... we are not bound by the trial court's findings and conclusions, [but] they aid our review by providing reasons for the trial court's decision. We must affirm the trial court's entry of summary judgment if it can be sustained on any theory or basis in the record.
>
> *Altevogt v. Brand,* 963 N.E.2d 1146, 1150 (Ind.Ct.App.2012) (citations omitted).

I. The Nature of McIntire's Complaint

[1] The trial court concluded that McIntire's claim was barred by her failure to comply with the notice requirements of the ITCA. McIntire argues on appeal that she was not required to do so because her complaint did not sound in tort but rather in contract. We disagree with McIntire that her claim is based on contract.

McIntire's complaint states that "[t]his action arises under the Indiana Constitution and common law." Appellant's App. p. 11. The legal allegations of McIntire's complaint state in relevant part:

> 32. McIntire's minor children are subject to Indiana's laws regarding compulsory school attendance pursuant to I.C. § 20–33–2–4.
>
> 33. Indiana's public schools are not allowed to charge tuition, pursuant to Article 8, Section 1 of the Indiana Constitution.

34. [The School Corporation] charging and collecting the [fees] in paragraphs 8–30 constitutes the charging of tuition in violation of the Indiana Constitution.

35. [The School Corporation] is liable for the return of these fees to those persons, including McIntire, who paid them.

Appellant's App. pp. 14–15. And in her claim for relief, McIntire requested the trial court to:

A. CERTIFY the Class as requested,

B. ENTER judgment in her and the Class's favor,

C. AWARD her and the Class such damages as determined to be just and proper,

D. GRANT her and the Class attorney's fees.

E. ENJOIN [the School Corporation] from charging any fee that is legally tuition, and

F. ENTER all other just and proper relief in the premises.

Id. at 15.

There is nothing in the complaint which would suggest that it is, as McIntire now claims, based in contract. There is no allegation of the basic elements of a contract claim: an offer, acceptance, a manifestation of mutual assent, and consideration. *See Ind. Bureau of Motor Vehicles v. Ash, Inc.*, 895 N.E.2d 359, 365 (Ind.Ct.App.2008) (setting forth the elements required for the existence of a binding contract). On appeal, McIntire argues that her claim is based on an implied contract, the terms of which were that if she resided ***135** in the School Corporation's district and paid the now-challenged fees, her children could attend the School Corporation's schools. We do not agree.

First, we decline to hold that merely living in the boundaries of a school corporation can form the basis of a contract. Moreover, even if we were to agree with McIntire with regard to the existence of a contract between her and the School Corporation, she develops no argument with regard to how the School Corporation breached the contract, as her children were allowed to attend the School Corporation's schools.

Instead, McIntire argues that the contract she allegedly entered into with the School Corporation was improper because it was based on the payment of unconstitutional school fees. We conclude that McIntire's complaint is not based on contract; it simply claims that the actions of the School Corporation in charging the fees were unconstitutional. But our conclusion does not mean that we agree with the trial court that McIntire's claim sounds in tort and is therefore subject to the notice requirements of the ITCA.

II. ITCA Notice Not Required

[2] The trial court concluded that McIntire's claim sounded in tort and that her claim was therefore barred because she admittedly did not comply with the notice requirements of the ITCA. "In general, the ITCA requires notice of claims against governmental entities and public employees to be given soon after the event." *Cantrell v. Morris*, 849 N.E.2d 488, 495 (Ind.2006). The applicability of the ITCA to constitutional claims was recently addressed by this court in *Hoagland v. Franklin Township Community School Corp.*, 10 N.E.3d 1034 (Ind.Ct.App.2014), *trans. pending*,[FN2] which involved the same School Corporation in the case currently before us.

FN2. We recognize that our opinion in *Hoagland* is not yet certified because a petition for transfer to our supreme court is pending, but we are nevertheless persuaded by its reasoning.

At issue in *Hoagland* was the decision of the School Corporation to end transportation, i.e. bussing, for students during the 2011–2012 school year. The School Corporation instead sold, for $1.00, all of its transportation equipment, including its school busses, to Central Indiana Educational

Service Center ("CIESC"). CIESC then offered transportation for students whose parents agreed to pay $475, plus a $20 non-refundable deposit, per student, with transportation for each additional child costing an additional $405. Despite an opinion from the Indiana Attorney General that this plan was unconstitutional under the Education Clause of the Indiana Constitution, as construed by our supreme court in *Nagy v. Evansville–Vanderburgh School Corp.,* 844 N.E.2d 481 (Ind.2006), the School Corporation proceeded with its plan. This left parents of students in Franklin Township with the choice of paying the transportation fee, or making alternative arrangements to transport their children to and from school.

The plaintiff, Hoagland, whose children qualified for the federal free-and-reduced-lunch program, opted to take her two children to and from school instead of pay the $900 in transportation fees that would have allowed her children to ride the school bus. After the Indiana Attorney General issued another opinion stating that the School Corporation's arrangement with CIESC was unconstitutional, Hoagland filed a class-action claim against the School Corporation and CIESC, alleging that the transportation arrangement was unlawful and seeking declaratory, injunctive, and ***136** monetary relief.[FN3] After Hoagland's suit was filed, the School Corporation reversed course and began to offer bussing to its students at no charge. By the time the case arrived on appeal to this court,[FN4] the issues remaining were: (1) whether the ITCA barred the plaintiffs' claims; (2) whether the plaintiffs were entitled to monetary damages under the Indiana Constitution; and (3) whether the School Corporation had violated the Education Clause of the Indiana Constitution.

> FN3. Hoagland was the named plaintiff for the class of parents who had not paid the transportation fee to CIESC, and plaintiff Chapman was the named plaintiff for the class of parents who had paid the transportation fee. *See Hoagland,* 10 N.E.3d at 1037.
>
> FN4. This court affirmed the trial court's order granting CIESC's motion to dismiss in a not-for-publication decision. *See Chapman v. Central Indiana Educational Service Center,* 49A05–1209–PL–478, 2013 WL 1846610 (Ind.Ct.App. Apr. 30, 2013) (memorandum decision), *trans. denied.*

With regard to the first issue, this court agreed with the plaintiff that she was asserting a state constitutional claim, not a tort claim, and that she did not have to file a notice under the ITCA. We wrote:

> By its express language, the ITCA "applies only to a claim or suit in tort." Ind.Code § 34–13–3–1. A tort is defined as "a civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons who stand in a particular relation to one another." Black's Law Dictionary 1526 (8th ed. 2004). Hoagland's claim sounds in Indiana's Education Clause, not tort law, and for reasons explained below, she may not seek monetary damages. Moreover, this case does not involve the type of loss contemplated by the ITCA: in general, the ITCA requires a plaintiff to give notice of a claim soon after a loss occurs, and the ITCA defines "loss" as "injury to or death of a person or damages to property." Ind.Code § 34–6–2–75. Therefore, in light of the ITCA's express language, we conclude that the ITCA does not govern Hoagland's state constitutional claim.

Hoagland, 10 N.E.3d at 1039–40 (footnotes omitted).

[3] Thus, under *Hoagland,* it is clear that McIntire need not have filed a notice of her claim under the ITCA because it is not based on an injury to or death of a person or damages to property. *See id.* As we noted above, McIntire's claim is not based on contract, but neither is it based on a "loss"

as defined by the ITCA. *See Hoagland,* 10 N.E.3d at 1039–40.[FN5] Accordingly,***137** the trial court erred in concluding that McIntire's claim was subject to the notice provisions of the ITCA.

FN5. We recognize that this portion of the holding in *Hoagland* could be read to conflict with the opinion of our supreme court in *Cantrell, supra.* In *Cantrell,* the court answered a certified question from a federal district court regarding whether a public defender who was terminated from his position could maintain a private right of action under the free-speech provisions of Article 1, Section 9 of the Indiana Constitution. The *Cantrell* court held that, "whether or not ... the Indiana Constitution affords any protection to public employees under some circumstances, a terminated employee has no private right of action for damages that arise under that Section." 849 N.E.2d at 492. Instead, the court held that such a claim must be addressed under the common law tort of wrongful discharge, which was subject to the ITCA. *Id.* at 494 .

> We do not read *Hoagland* as conflicting with *Cantrell.* Instead, we read *Cantrell* as saying that the ITCA is applicable to a constitutional claim *if* that claim is based on a tort, e.g., the tort of wrongful discharge at issue in Cantrell. *See* 849 N.E.2d at 498 ("This does not constitute recognition of an implied tort arising under the Constitution. Rather, it recognizes that the already-established tort of wrongful discharge can be based on termination for exercise of a constitution ... right."). And we read *Hoagland* to state that a simple constitutional claim—independent of any tort—is not subject to the ITCA. Indeed, the plaintiff's claim in *Hoagland* was not presented as a tort claim at all, as the court specifically noted that " Hoagland's claim sounds in Indiana's Education Clause, not tort law[.]" 10 N.E.3d at 1039. Because *McIntire* does not allege a constitutionally-based tort, *Cantrell* is not controlling.

III. Constitutional Claim

Having concluded that McIntire's claim is not one based in contract or in tort law, the question then becomes: what is the basis of McIntire's claim? We think that it is clear from the face of the complaint that she is alleging a direct violation of Article 8, Section 1 of the Indiana Constitution. In other words, she claims that the School Corporation's actions of charging the fees amounted to charging for "tuition," which is prohibited by Article 8, Section 1.

[4] Unfortunately for McIntire, this court explicitly held in *Hoagland* that there can be no claim for monetary damages arising out of the Indiana Constitution. In fact, the holding in *Hoagland* could be no clearer: "There is no express or implied right of action for monetary damages under the Indiana Constitution." 10 N.E.3d at 1040 (citing *Smith v. Ind. Dep't of Correction,* 871 N.E.2d 975, 985–86 (Ind.Ct.App.2007)). Accordingly, the plaintiffs in *Hoagland* could not succeed on their claim for damages. *Id.* And the same is true here. Because there is no right of action for monetary damages under the Indiana Constitution, McIntire's claim for such damages must fail.

McIntire's citation to *Nagy, supra,* is unavailing with regard to her claim for monetary damages. In that case, our supreme court held that a school corporation's charging of a $20 "student services" fee for all students amounted to tuition and was impermissible under Article 8, Section 1. *Nagy,* 844 N.E.2d at 482. But in that case, the plaintiffs sought only declaratory and injunctive relief, not monetary damages. *See id.* Accordingly, although *Nagy* supports McIntire's claim that the School Corporation's fees might be constitutionally infirm, it does not support her claim for monetary damages.

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(Cite as: 15 N.E.3d 131)

Nor do we agree with McIntire's claim that our holding would leave her without any remedy for a constitutional violation, thereby leading to an illusory right. *See George v. State,* 211 Ind. 429, 434, 6 N.E.2d 336, 338 (1937) (noting the "elementary maxim" that "there is no right without a remedy."). McIntire did not have to pay the fees at issue. She could have immediately sought injunctive relief before paying the fees. Indeed, in *Hoagland*, there were two classes of parents: those who did pay the transportation fees and those who did not pay the transportation fees. *See* 10 N.E.3d at 1037.[FN6]

> FN6. We express no opinion regarding whether McIntire could seek the return of the fees under Article I, Section 21 of the Indiana Constitution, which prohibits the taking of property without just compensation. *See Cheatham v. Pohle,* 789 N.E.2d 467, 472 (Ind.2003).

Conclusion

Although we reject McIntire's claim that her complaint sounds in contract, we agree that the trial court erred in concluding that McIntire's claim was subject to the notice requirements of the ITCA. This error is not grounds for reversal, however, because, even if McIntire's claim is not subject to the ITCA, she cannot seek monetary damages for a violation of the Indiana Constitution. Accordingly, we affirm the trial court's grant of summary ***138** judgment in favor of the School Corporation.

Affirmed.

FRIEDLANDER, J., and PYLE, J., concur.

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15 N.E.3d 131, 307 Ed. Law Rep. 1057

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Exhibit N

Not Reported in N.E.2d, 2006 WL 1975871 (Ohio App. 3 Dist.), 2006 -Ohio- 3633
(Cite as: 2006 WL 1975871 (Ohio App. 3 Dist.))

H

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Third District, Allen County.
Gerald L. **KEENAN**, et al. Plaintiffs-Appellants
v.
ADECCO EMPLOYMENT SERVICES, INC. Defendant-Appellee.

No. 1-06-10.
Decided July 17, 2006.

Civil Appeal from Common Pleas Court. Judgment affirmed.
William B. Balyeat, Attorney at Law, Reg. # 0007341, Lima, for Appellant.

O. Judson Scheaf, III, Attorney at Law, Reg. # 0040285, Craig A. Calcaterra, Attorney at Law, Reg. # 0070177, Columbus, for Appellee.

Matthew C. Huffman, Attorney at Law, Reg. # 0029473, Lima, for Appellee.

SHAW, J.

***1** {¶ 1} Appellants, Gerald L. Keenan and Gerald L. Keenan, LLC ("Keenan"), appeal the December 30, 2005 judgment of the Court of Common Pleas, Allen County, Ohio, dismissing their complaint pursuant to Civ.R. 12(B)(6). Although originally placed on our accelerated calendar, we have elected, pursuant to Local Rule 12(5), to issue a full opinion in lieu of a judgment entry.

{¶ 2} Keenan formerly owned a franchise of Norrell Services, Inc. ("Norrell"), a temporary staffing agency. The franchisee rights were subsequently transferred to Gerald L. Keenan, LLC. Keenan initially filed a complaint both individually and as owner of Gerald L. Keenan, LLC alleging breach of contract against defendant-appellee Adecco Employment Services, Inc.'s ("Adecco"). The dispute arose out of agreements between his former Norrell Services franchise and two companies now owned by Adecco, Adia Services Inc. ("Adia") and Marshall Personnel Systems, Inc. These agreements purportedly subcontracted for Norrell to provide temporary staffing services for the Honda of America auto manufacturing plant located in Anna, Ohio. Keenan alleged that these agreements guaranteed that his company would fill eighty percent of all temporary associate positions at the Honda plant.

{¶ 3} Subsequent to the initial complaint, Adecco filed a motion for more definite statement, which the trial court granted. The court also ordered Keenan to attach all written documents referred to in the complaint as required by Civ.R. 10(D)(1). Keenan thereafter filed an amended complaint, which included two Subcontractor service agreements between Norrell and Adia. The complaint also alleged that "several subsequent" agreements were signed between the parties, however, those documents were not attached to the complaint.

{¶ 4} Adecco then filed a motion to dismiss pursuant to Civ.R. 12(B)(6), arguing that Keenan had failed to state a claim upon which relief could be granted because the agreements attached to the complaint specifically disavowed any guarantee as to the amount of temporary positions Keenan was contracting for. The trial court granted the motion to dismiss pursuant to Civ.R. 12(B)(6), finding that the agreements "unambiguously exclude[ ] any guarantees with respect to staffing levels and, thus, the writings (contracts) upon which plaintiffs' claims are based present an insuperable bar to relief." Keenan now appeals that judgment, asserting two assignments of error:

> The trial court erred in its dismissal of plaintiff's amended complaint because plaintiff had sub-

stantially complied with Ohio Rules of Civil Procedure Rule 8.

The trial court erred in granting defendant's motion to strike because defendant had failed to comply with plaintiffs' request for production of documents which denied the plaintiffs the opportunity to more fully substantiate plaintiffs' claims made.

{¶ 5} Keenan makes two arguments in support of his contention that the trial court erred in granting the motion to dismiss pursuant to Civ.R. 12(B)(6). First, he argues that he sufficiently asserted his claim by meeting the requirements of Civ.R. 8(A). Second, he argues that the documentary evidence needed to support his claim was in Adecco's possession, and Adecco had failed to respond to requests for production of documents.

***2** {¶ 6} In reviewing a 12(B)(6) motion for dismissal, the court must accept all of the factual allegations in the complaint as true. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753. Because the factual allegations are presumed to be true, a reviewing court must decide only legal issues, and an entry of dismissal on the pleadings is reviewed de novo. *Schumacher v. Amalgamated Leasing, Inc.* (2004), 156 Ohio App.3d 393, 806 N.E.2d 189, 2004-Ohio-1203, at ¶ 5, citing *Mitchell,* 40 Ohio St.3d at 192, 532 N.E.2d 753. The motion to dismiss is viewed with disfavor and should rarely be granted. See, e.g., *Madison v. Purdy* (5th Cir.1969), 410 F.2d 99, 100-101.

{¶ 7} A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548, 605 N.E.2d 378. A court inquires whether the allegations constitute a statement of claim under Civ.R. 8(A). "In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted * * *, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus.

{¶ 8} In the instant case, appellants' argue that their claim is sufficiently plead under Civ.R. 8(A), which requires only "a short and plain statement of the claim showing that the party is entitled to relief." Civ.R. 8(A). This argument ignores the requirements of Civ.R. 10(D); when a claim alleges a breach of contract the party asserting the claim must attach the alleged agreements to the complaint. Any written instrument attached to a pleading pursuant to Civ.R. 10(C) & (D) is part thereof for pleading purposes. Thus, although a reviewing court generally looks only to the complaint in order to determine whether the claimant has brought a legally sufficient action, the court will also look to written instruments upon which the claim is predicated when those documents are attached pursuant to the Civil Rules. See *Ohio Council 8 v. Ohio Dept. of Mental Health* (Dec. 2, 1982), 2nd Dist. No. CA-7794, CA-7808, unreported, 1982 WL 3874 (citing *Slife v. Kundtz Properties, Inc.* (1974), 40 Ohio App.2d 179, 185-186, 318 N.E.2d 557)

{¶ 9} Therefore, in an action alleging a breach of contract a reviewing court must look not only to the allegations in the complaint but also to the language of the contract. A motion to dismiss pursuant to Civ.R. 12(B)(6) should be granted in such cases "only where the allegations in the complaint show the court to a certainty that the plaintiff can prove no set of facts upon which he might recover, or where the claim is predicated on some writing attached to the complaint pursuant to Civil Rule 10(D) and that writing presents an insuperable bar to relief." *Slife,* 40 Ohio App.2d at 185-186. Dismissals under Civ.R. 12(B)(6) are proper where the language of the writing is clear and unambiguous.

***3** {¶ 10} Keenan's amended complaint asserts one claim: that Adecco and its predecessor companies breached subcontractor agreements with the staffing agency in which they had agreed to award eighty percent of all temporary associates employed

at the Honda plant to the agency. He alleges that his company signed a Subcontractor Service Agreement with Adecco's predecessor company and reached "several subsequent agreements" with Adecco itself. However, the only agreements attached to the complaint pursuant to Civ.R. 10(D) were two subcontractor service agreements between appellants and Adecco's predecessors; no "subsequent agreements" were ever included. Therefore, we can only look to the complaint and these agreements to determine whether the appellants have alleged a set of facts upon which they might recover or whether the agreements provide an insuperable bar to relief for these claims.

{¶ 11} Courts construe guarantee agreements in the same manner as they interpret contracts. *G.F. Business Equip. v. Liston* (1982), 7 Ohio App.3d 223, 224, 454 N.E.2d 1358; *Stone v. Natl. City Bank* (1995), 106 Ohio App.3d 212, 665 N.E.2d 746. Neither of the guarantee contracts at issue in this case contain any express guarantees that appellants will provide eighty percent of the Honda plants temporary staffing needs. However, an attachment to both agreements does contain the following language:

> Although there are no guarantees, this long-term partnership should result in your agency securing consistent business.

{¶ 12} Moreover, the second agreement also expressly states, "there are no guarantees as to volume levels." Thus, language contained in the agreements expressly contradict appellants' assertion that they were guaranteed eighty percent of the temporary staffing positions available at the Honda plant. This language precludes the appellants from recovering on their asserted claim.

{¶ 13} Accordingly, the written instruments attached to the amended complaint provide an insuperable bar to recovery on the sole claim asserted by the appellants in the complaint. Therefore, the trial court correctly dismissed the complaint under Civ.R. 12(B)(6). Keenan's first assignment of error is overruled.

{¶ 14} Keenan's second assignment of error asserts that the trial court should have ordered the defendants to comply with the request for production of documents prior to ruling on the motion to dismiss. However, a motion to dismiss under Civ.R. 12(B)(6) is directed solely at the pleadings. See *Assoc. for Defense of Washington Local School Dist. v. Kiger* (1989), 42 Ohio St.3d 116, 537 N.E.2d 1292; *Winkle v. Southdown, Inc.* (Sept. 3, 1993), 2nd Dist. No. 92-CA-107, unreported, 1993 WL 333643, at *5 (citing *Marino v. City of Niles* (Sept. 15, 1989), Trumbull App. No. 88-T-4418, unreported). "It is axiomatic that discovery under the Civil Rules is generally outside the scope of the pleadings." *Winkle,* supra at *5 (citing *Poulos v. Parker Sweeper Co.* (1989), 44 Ohio St.3d 124). Therefore, when ruling on a motion to dismiss pursuant to Civ.R. 12(B)(6) documents and evidence not contained in the pleadings are irrelevant.

***4** {¶ 15} Keenan essentially argues that if he were permitted to conduct discovery he would find the contracts upon which he relies for his assertion that his company was guaranteed eighty percent of the temporary staffing openings. However, as the court noted in *Winkle,* the purpose of discovery is not to permit one party to conduct a "fishing expedition" for evidence to support their claim. Id. The Civil Rules require the party asserting a claim for breach of contract to attach the agreements at issue to the complaint. Civ. 10(D).[FN1]

> FN1. Civ.R. 10(D)(1) provides: "When any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading. If the account or written instrument is not attached, the reason for the omission must be stated in the pleading." This permits a claimant to assert a claim even if she does not have the written instrument in question, after which she is certainly entitled to obtain the instrument through discovery. However, in

> the instant case Keenan did not state his reasons for failing to attach the agreements in question anywhere in the amended complaint.

{¶ 16} As previously stated, the contracts Keenan has relied on expressly contradict the claim asserted in the complaint, and thus the court properly dismissed the complaint under Civ.R. 12(B)(6). Permitting discovery when the allegations in the complaint are insufficient to state a claim would be improper. Therefore, based on the foregoing appellants' second assignment of error is overruled. The judgment of the trial court is affirmed.

Judgment affirmed.

BRYANT, P.J., and CUPP, J., concur.

Ohio App. 3 Dist.,2006.
Keenan v. Adecco Emp. Servs., Inc.
Not Reported in N.E.2d, 2006 WL 1975871 (Ohio App. 3 Dist.), 2006 -Ohio- 3633

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Exhibit O

C

Court of Common Pleas of Ohio,
General Division.
Butler County
UNIFUND CCR PARTNERS, Plaintiff,
v.
Michael W. GEISEN, Defendant.
No. CV 2008-02-1066.
May 7, 2008.

Decision and Entry Denying Defendant's Motion to Dismiss

Derek Scranton, Esq., P.O. Box 42730, Cincinnati, Ohio 45242.Donald Meyer, Jr., Esq., Donald J. Meyer, Jr., Co., LPA, 1005 Harrison Avenue, Harrison, Ohio 45030.

Noah E. Powers II, Judge.
THIS MATTER came before the Court on Defendant Michael W. Geisen's *Motion to Dismiss Complaint.* Plaintiff responded to the motion and as of May 5, 2008, Defendant has not filed any reply. The Court has reviewed the memoranda, record, and the applicable law.

DECISION

Defendant moves the Court the dismiss Plaintiff's complaint for failure to comply with Civ.R. 10(D)(1). Civ.R. 10(D)(1) provides:
When any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading. If the account or written instrument is not attached, the reason for the omission must be stated in the pleading.

Plaintiff seeks recovery for monies it contends Geisen owes on a credit card issued by Chase Manhattan Bank USA NA. Attached to the *Complaint* is a copy of a document Plaintiff purports to be the Credit Card Agreement to which Defendant is bound. The document contains a handwritten header, "Chase Manhattan Bank," and is nearly illegible.

Defendant's argument is twofold: first, Plaintiff failed to attach the written assignment upon which its claim is based, and second, that Plaintiff has failed to attach the assignment of the debt.

The Court will first address the Plaintiff's second contention. Ohio is a "notice pleading" state with a regimen set forth in the Federal Rules of Civil Procedure and incorporated into the Ohio Rules of Civil Procedure. *York v. Ohio State Highway Patrol* (1991), 60 Ohio St.3d 143, 144. "Under these rules, a plaintiff is not required to prove his or her case at the pleading stage." *Id.* at 144-145. However, a suit upon an account involves a more specific rule that "provides that when a claim is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading." *Capital One Bank v. Toney,* Seventh Dist. No. 06 JE 28, 2007-Ohio-1571 at ¶30.

"Civ.R. 10(D) specifically states that a *copy of the account or written instrument* must be attached to the com-

plaint. It does not merely ask for attachment of *evidence of the account or contract.* If a copy of the account or written instrument is not attached, the rule specifies that the plaintiff must explain why." *Id.* at ¶37. (Emphasis original.)

In the case *sub judice,* Plaintiff tries to couch its failure to attach a copy of the account and its lack of explanation, on its first claim for breach of contract and points out that the contract is attached to the complaint. The Court is not persuaded by said argument. "[A] suit concerning a credit card balance has been held to constitute an action on an account for purposes of Civ.R. 10(D)'s requirement that a copy of the account must be attached to the complaint." *Id.* at ¶34. (Citations omitted.)

The action is one that allows a plaintiff to consolidate several different claims rather than file a suit upon each purchase and courts have "held that in a complaint asserting an action on account, the plaintiff must set forth *an actual copy of the recorded account." Id.* at ¶35. (Citations omitted. Emphasis original.)

The Court finds that the attachment of the alleged contract is insufficient to meet with the requirements prescribed in Civ.R. 10(D). However, Defendant's *Motion to Dismiss* is not warranted. "A Civ.R. 12(E) motion for a more definite statement is the proper vehicle for seeking the account required to be attached under Civ.R. 10(D)." *Id.* at ¶3 1. (Citations omitted.)

Turning towards Defendant's contention regarding the lack of assignment, the contention directly challenges Plaintiff's capacity to sue upon the debt. Civ.R. 9(A) provides:
When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

In the case *sub judice,* Defendant contends that pursuant to Civ.R. 10(D)(1), a copy of the assignment of the account to Unifund CCR should have been attached to the complaint. As previously indicated, Ohio is a notice pleading state, and a Court must presume the facts in the complaint as true, for purposes of the motion. See *Fahnbulleh v. Strahan* (1995), 73 Ohio St.3d 666. For purposes of the complaint, the Court finds that Plaintiff's averment that, by the execution of an assignment, it is the holder of the account, sufficient for the purposes of notice pleading.

It should be noted that if Defendant, later, properly raises Plaintiff's capacity to sue, pursuant to Civ.R. 9(A), the documents submitted by Plaintiff as exhibits to its *Memorandum in Opposition* appear to be insufficient to overcome any negative averment raised by Defendant. Plaintiff contends that the exhibits show the succession of ownership of Defendant's account from Chase Manhattan Bank to Unifund CCR Partners; yet, said documents are not attested to, nor do they contain the exhibits referenced in them, hence there is no indication that Defendant's account was one of those included in the sales of debts.

ENTRY

THEREFORE, IT IS ORDERED that Defendant Michael W. Geisen's *Motion to Dismiss Complaint,* be, and is hereby, DENIED.

Defendant shall have 28 days from the filing of this *Entry* to answer or otherwise plead.

SO ORDERED:

<<signature>>

NOAH E. POWERS II, JUDGE

CC:

Derek Scranton, Esq.

P.O. Box 42730

Cincinnati, Ohio 45242

Donald Meyer, Jr., Esq.

DONALD J. MEYER, JR., CO., LPA

1005 Harrison Avenue

Harrison, Ohio 45030

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